IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1075

JACOB FERSHTMAN, HAROLD SIEGEL, ISABEL WEST, ZITA GARFIELD, LARRY SOMMA, HYMAN FREYDBERG, RENA KLEIN, JACOB KRIVILOFF, AGNES SHOEMAKER, as Executrix of the Estate of ROBERT SHOEMAKER, individually and as Limited Partners of PENN ASSOCIATES, a New York Limited partnership,

Petitioners,

-against-

HERMAN J. SCHECTMAN, SIDNEY P. SCHECTMAN, JOHN D. BUSSEL, HENRY SPELLMAN, GEORGE ZUCKERMAN, individually, and as General Partners of PENN ASSOCIATES, PENN ASSOCIATES, 461-8TH AVENUE CORPORATION, ROSE W. GROSS, as Executrix of the Estate of SIMEON F. GROSS and ELLIOT S. GROSS, co-partners doing business under the firm and style of "Simeon F. Gross and Elliot S. Gross", ROSE W. GROSS as sole distributee of the Estate of SIMEON F. GROSS, ELLIOT S. GROSS and ARTHUR YOUNG & COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this case on November 3, 1971. Petitioners' motion for rehearing was denied by order dated November 26, 1971.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit, 450 F2d 1357 (1971), is annexed as Appendix A and appears at pp. 1a-9a of the Appendix, *infra.* The opinion of the

District Court for the Southern District of New York is unreported and is set forth as Appendix B at p. 10a.

Jurisdiction

The judgment of the Court of Appeals was entered November 3, 1971. A timely petition for rehearing was denied on November 26, 1971 and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Did the Court below err in affirming the dismissal of the complaint for want of federal jurisdiction, where the record indicates a "forced sale" of the limited partners' security interests resulting from the self-serving declaration of termination of the partnership by the respondent general partners, in conflict with applicable decisions of the Supreme Court?

2. Are Rule 10b-5 and Section 10(b) violated, where general partners of a limited partnership, by the device or scheme of making a self serving unilateral declaration of termination of the partnership, fraudulently appropriate and convert the leasehold asset, by the transfer of the stock of the corporate respondent to themselves, without making any attempt to sell the leasehold asset of the partnership to fulfill their fiduciary obligation to turn the assets of the partnership into a profit for all?

3. Did the Court below err in affirming the dismissal of the complaint by narrowly interpreting the intent of Congress in passing the Federal Securities Laws by restricting federal jurisdiction instead of liberally construing said laws to prevent fraud and unjust enrichment?

4. Has the Court of Appeals, in holding the petitioners' complaint should be dismissed for want of federal jurisdiction in connection with the "forced sale" of limited partnership security interests, erroneously invoked the purchaser-seller restriction enunciated in *Birnbaum v. Newport Steel Corp.*, 193 F2d 461 (2d Cir., 1952) cert. denied, 343 U.S. 956 (1952), which restriction is an important principle of Federal Securities Law that should be abolished, but which has not been, and should be decided by the Supreme Court?

Statutes and Regulations Involved

This is a derivative action brought by limited partners of Penn Associates to recover damages based on violations of section 17(a) of the Securities Act of 1933, 15 USC section 77q(a), and section 10(b) of the Securities Exchange Act of 1934, 15 USC section 78j(b), together with Rule 10b-5, 17 CFR section 240. 10b-5 of the Securities and Exchange Commission.

Section 17(a) of the Securities Act states:

> "It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly–
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which

they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

Section 10(b) of the Exchange Act states:

"Section 10 It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule 10b-5 provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security."

Statement of the Case

A. *Federal Jurisdiction.*

Federal jurisdiction in the District Court is based on United States Code, Title 15, sections 77v, 78aa.

Section 77v in part states:

"(a) The district courts of the United States, . . ., shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter."

Section 78aa in part states:

"The district courts of the United States, . . ., shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder."

B. *Parties and Cause of Action.*

Petitioners are nine out of forty-seven limited partners of

"Penn Associates", a New York Limited Partnership.* They instituted this derivative action under the Federal Securities Laws on behalf of Penn Associates to recover $2,000,000 compensatory damages from the defendants, representing the value of the leasehold assets of Penn Associates which the respondents fraudulently appropriated and converted. The individual general partners consumated the fraudulent scheme, aided and abetted by the other respondents.

C. The Facts.

1. The Formation of the Partnership.

In 1955, Albert Kaine was a New York accountant who had numerous clients owning drug stores. Respondents, Herman J. Schectman and his son, Sidney P. Schectman, were brokers specializing in the purchase and sale of drug stores. As such, Kaine had made their acquaintance. Some time prior to October 28, 1955, Messrs. Schectman approached Kaine stating the General Partner Respondents were forming a limited partnership (Whitney Realty Co.) to acquire a parcel of real estate. They asked Kaine if he and his clients would be interested in becoming limited partners, which they did.

Shortly thereafter in April, 1956, the Messrs. Schectman again advised Kaine that the general partners were syndicating Penn Associates for the purchase of a 16-1/2 year balance of a lease expiring November 30, 1971 and a subordinate mortgage on a parcel of real estate consisting of an office building located at 461 Eighth Avenue, New York City, and an adjoining parking lot. The rental from this acquisition, so they advised, was to be shared with the limited partners.

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*The general partners are the Respondents, Herman J. Schectman, Sidney P. Schectman, John D. Bussel, Henry Spellman and George Zuckerman.

The Schectmans asked Kaine if he and his clients would be interested in participating as limited partners in Penn as they had in Whitney. Kaine asked for the details and the Messrs. Schectman exhibited a sheet of paper showing operating figures for the preceding fiscal year. It was represented that $730,000 capital would be required with the Limited Partners contributing $400,000 and the General Partners contributing $330,000. Of the capital, $286,250 was required to cover the acquisition of the lease, $393,750 for the mortgage, and $50,000 was for working capital. The lease was represented by defendants as having good possibilities of appreciation in value as rents increased and, upon the sale thereof, all the partners would share capital gain in proportion to their cash capital contribution and would, as well, enjoy their share of increased rents until the lease was sold.

Kaine discussed the proposition with his clients and friends, the plaintiffs in the instant action and the *Kaine* action, (hereafter referred to) and notified Messrs. Schectman they were agreeable to purchase limited partnership interests. Twelve of the limited partners, contributing over $50,000, were brought in by Kaine.

Early in May, 1956 the limited partners were notified by the general partners that all partners, including defendants, would have to contribute their capital. No proposed written partnership agreement was presented to them nor was mention made that they would later be required to execute a written partnership agreement.

A few days after the limited partners had contributed their cash capital contribution, they were contacted late on Friday.

May 4, 1956, and told they would have to attend at the general partners' offices to sign partnership papers on the next day, Saturday, May 5, 1956, otherwise they might lose out on the deal or lose out on at least a month's rent. Those of the partners who responded they would not be able to attend on Saturday either agreed to attend on Monday, May 7, 1956, or the managing partners had the papers delivered to their homes or places of business over the weekend where they were signed.

Copies of the partnership agreement or certificates were not distributed to the limited partners before they were submitted to them for signature. The general partners admitted on deposition that no limited partner was represented by counsel or had an opportunity to consult with an attorney or show the agreement or certificate to such attorney. Signatures were obtained by circulating two (2) copies among the 47 limited partners on Saturday and Monday, May 5th and 7th, so that the certificate of limited partnership could be filed in the New York County Clerk's office on Monday, May 7, 1956, in order that the closing, which had been scheduled for that day, could take place.

Kaine was not able to come to the Schectman's office on Saturday, May 5, 1956 as requested and so the Schectmans dispatched the proposed partnership agreement and certificate of limited partnership to his home in Mount Vernon, New York. On a casual reading of the documents by Kaine contradictory language in paragraph 8 of each were confusing in the light of the technical legal step-by-step provisions contained in paragraphs 6, 8 and 14 of the partnership agreement, which paragraphs when read together seemed to provide that the partnership could only terminate upon the sale of the lease prior to its expiration.

The difference in the language of both paragraphs "8" and the language in paragraph 6 raised a question in Kaine's mind whether the documents could be construed that the general partners could arbitrarily elect to pay off the limited partners at any time as if they were creditors of the partnership rather than only upon a sale of the leasehold as previously represented. Accordingly, before signing, Kaine called the Schectmans who assured him that the intention was that the partnership could only be terminated upon a sale of the lease or the termination of the partnership's interest in the venture. These respondents told Kaine to sign the agreement and certificate and to instruct his associates to do likewise because it had to be filed on Monday, May 7, 1956, in order to give legal effect to the partnership, and that respondents would confirm their understanding in writing.

Accordingly, Sidney Schectman wrote a letter, dated May 14, 1956, in which he assured plaintiffs as follows:

> "* * * the general partners can only pay off the limited partners in the event that the leasehold of the office building is sold." (App. C, p. 19a)

2. The "forced sale" involved.

By letter, dated March 29, 1968, to which was attached respondents' Arthur Young & Company statements, dated March 31, 1968, the general partners notified the limited partners of their unilateral declaration of termination of the partnership.

On receipt of this letter and being cognizant the lease had three and one-half more years to go and that no mention was made of the sale of the lease and distribution of capital gain, Kaine consulted his attorney who thereafter caused a search to

be made of the applicable land records. This search disclosed, theretofore unbeknown to petitioners, a 20-year extension of the lease on the premises to December 31, 1988 in favor of the respondent 461-8th Avenue Corporation, as lessee. The extended lease was dated as of January 1, 1968, signed on behalf of the respondent 461-8th Avenue Corporation by the general partner Sidney P. Schectman, as an officer thereof. The address of the corporation, shown on said lease, was c/o H. Schectman & Sons, said respondents drug store brokerage firm at 1440 Broadway, New York.

Upon discovery of respondents' appropriation of the extended lease, Kaine and two of the limited partners instituted a derivative action on behalf of Penn Associates against the general partners and their alleged wholly-owned 461-8th Avenue Corporation, for a judgment declaring defendants constructive trustees on behalf of the partnership of the lease (hereafter referred to as the "Kaine" action*).

On deposition of the general partners in the "Kaine" action, the limited partners first became aware of certain other undisclosed facts, i.e.

(a) Although the March 29, 1968 notice to limited partners stated "the general partners have elected to return to the Limited Partners the balance of their capital contributions, and to *terminate the Limited Partnership*, effective March 31, 1968", on August 21, 1969, almost a year and one-half later, on the deposition of one of the defendants Penn Associates was still in existence;

The petitioners moved in the District Court for consolidation or joint trial of both actions for judicial economy which the District Court denied.

(b) In order to obtain the extended lease as of January 1, 1968 to December 31, 1988 the general partners had to release to the owners of the fee part of the leased premises consisting of a parking lot which brought in $10,000 a year rental which the limited partners shared in computing the overage of rents;

(c) The extended lease had become more valuable, yet the defendants made no effort to turn it into a capital gain profit;

(d) The general partners contemplated terminating the partnership upon obtaining the extension to the lease.

(e) Title to the lease had been originally taken in the name of the respondent 461-8th Avenue Corporation, which was capitalized at $300. The reason advanced for taking title to the lease in the name of the corporate respondent was (i) to limit personal liability for rent and (ii) the lease from the owner of the fee permitted only one assignment which was being exercised on its purchase. By taking title to the lease in the name of the corporation, respondents contended it would permit the sale of the lease asset by a sale of the stock of the corporation and thereby permit the distribution of capital gain to all partners.

(f) The stock of the respondent corporation was issued to one Simeon F. Gross, who was the undisclosed general partners' attorney. Until his death in 1964 he or his son, respondent Elliot S. Gross, filed corporate income tax returns stating he was the sole stockholder and president, which was attested to under penalties of perjury by the respondent, Arthur Young & Company. On Simeon F. Gross's death in December, 1964, his estate disclaimed

ownership of the stock to avoid including it as an asset of his estate, whereupon, his son, the respondent, Elliot S. Gross, transferred the stock to the General Partners without any consideration, although on deposition the general partners testified the stock was held by his father for the benefit of the partnership.

(g) The general partners paid no consideration for the transfer to themselves of the stock of the respondent corporation and were aware that taking the extension of the lease in the corporate respondents name they would become the exclusive owner of the lease upon declaring the partnership terminated.

(h) The general partners had entered into an operating agreement with the corporate respondent whereby the profits of the venture were to be shared 95% to the partnership and 5% to the corporate respondent. Even this arrangement was not adhered to, for it was profitable for the general partners to siphon all the tax benefits of the amortization of the cost of lease acquisition and leasehold improvements into the corporate defendant for the exclusive benefit of the general partners, and, accordingly, sufficient income of the partnership was transferred to the corporation each year to cover the aforesaid tax benefit deductions.

REASONS FOR GRANTING WRIT

I.

The decision below is in conflict with applicable decisions of this Court and raises significant and recurring questions concerning actions invoking Federal Securities Law jurisdiction.

The decision of the Circuit Court is in direct conflict with the decision of this Court in *Superintendent of Insurance of the State of New York v. Bankers L. & C. Co.*, ---- U.S. ----, 30 L.Ed.2d 128. The Court below handed down its decision November 3, 1971, five days before this Court's decision in *Supt. of Insurance, supra,* (November 8, 1971). Petitioners timely moved for a rehearing based on *Supt. of Insurance, supra,* which the Circuit Court denied. The Second Circuit's opinion in this case (App. A. pp. 1a-9a) represents important statutory and policy considerations emanating from a bona fide effort to invoke federal jurisdiction under the Federal Securities Laws. Efforts to invoke federal jurisdiction under the intention of Congress in enacting the Securities Laws are numerous. In many, the fraud are not the garden type associated with the purchase and sale of securities but may be as unique as the ingenuity of clever but not too conscientious minds can fraudulently devise. *Broll v. Perlow,* 375 F.2d 393, 397 (CA 2, 1967).

The Court below dismissed the complaint for "want of federal jurisdiction". In arriving at this conclusion it assumed by going outside the record that the attorney who may have composed part of the letter from the respondents to Kaine dated May 14, 1956 (App. "C" p.19) "was manifestly wrong." No trial testimony with available cross examinations, depositions or affidavits was available to the Circuit Court in arriving at this conclusion.

Considering the circumstances under which the partnership agreement and certificate of partnership were signed as heretofore described, a side by side comparison of paragraphs 8* in each of the documents is helpful to understand the doubt in petitioners' minds when the documents were presented for signature in the light of the representation that the parties were going into this venture to convert ordinary income into capital gain by a sale of the leasehold after rents were increased.

Paragraph 8 of the Certificate of Limited Partnership seemed to permit the return of the capital contributions of the Limited Partners at any time in the sole discretion of the General Partners with no reference to pro rata capital gain distribution provided for in paragraph 14 of the Partnership Agreement.

Partnership Agreement

"8. The contributions of the Limited Partners to the capital of the partnership may be returned to them in whole, or in part, at any time, in the sole discretion of the General Partners, provided that all repayments of capital shall be pro rata among all the Limited Partners, *subject to the provisions of paragraph 14.*

Certificate of Limited Partnership

"8. The contributions of the Limited Partners to the capital of the partnership may be returned to them in whole, or in part, at any time, in the sole discretion of the General Partners, provided that all repayments of capital shall be pro-rata among all the Limited Partners, *and further provided that in the event of the sale of the leasehold on premises 461 Eighth Avenue, New York City, the balance of the contribution of each Limited Partner shall be repaid in full.*

Contrary to paragraph "8" of the Certificate of Limited Partnership, paragraphs "6", "8" and "14"* of the partnership agreement are mutually supporting and not exclusive of one another and when read in conjunction with respondents' letter to Kaine dated May 14, 1956 (App. C.p.19a), where respondents state "[w]e would rather have had more time," makes it crystal clear that "* * * the general partners can only pay off the limited partners in the event that the leasehold of the office building is sold", and clearly indicates that unless the partnership interest in the leased property expired, the partnership could only be terminated if the lease was sold.

The general partners' March 29, 1968 unilateral declaration of termination of the partnership was misleading in that it represented that the partnership was being terminated

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*"6. The partnership shall commence on the date of filing the Certificate of Limited Partnership in the Office of the County Clerk of New York County. The partnership shall terminate on the 30th day of November, 1971, unless sooner terminated by either:

(a) a sale of the leasehold on the office building; or

(b) repayment of the contributions of the Limited Partners in full, as is more particularly hereinafter set forth;*

(c) retirement, death or insanity of a General Partner.

"8. The contribution of the limited partners may be returned to them * * * *subject to the provisions of paragraph 14.*"

"14. In the event that the agreement dated the 4th day of May, 1956 between 461-8th Avenue Corporation and partnership is cancelled *by reason of the sale of the leasehold on the office building*, then the Limited Partners shall be entitled to receive the following sums:

(a) Return of balance of capital contributions; and

(b) Twelve (12%) percent interest on such balance to be computed from the commencement of the current fiscal year, or the date of the most recent profit distribution, whichever period is shorter; and

(c) Ratable portion of the *capital gain* realized *upon such sale* on the proportion that the original capital contribution of each bears to SEVEN HUNDRED THIRTY THOUSAND ($730,000.00) DOLLARS."

whereas it was not and no disclosure was made of the 20 year extension of the lease which respondents appropriated thereby.

Section 10(b) and Rule 10b-5 prohibit among other things, the use of manipulative or deceptive devices, schemes, or contrivances to defraud or engage in any act which operates as a fraud or deceit upon any person and the omission to disclose material facts "in connection with the purchase or sale of any security." Section 10(b) and Rule 10b-5 further required the March 29, 1968,* "notice of termination of the partnership" not be misleading and required it to disclose the fact that the respondents had obtained a 20 year extension by releasing the parking lot the rental from which petitioners shared and the fact that because respondents had transferred the stock in 461-8th Avenue Corporation in whose name they had taken the extension of the lease upon the death of their attorney, the legal effect was they became the sole owners of the lease.

The fraud practiced on the limited partners and the unjust enrichment of the general partners by the appropriation and conversion of the valued leasehold is summarily disposed of by the Court of Appeals by narrowly interpreting the intention of Congress in passing the Federal Securities Laws. The opening sentence of its opinion indicates the restrictive approach to federal jurisdiction under the Federal Securities Acts in this Circuit. To the contrary, five days after the Circuit Court rendered its opinion this Court rendered its opinion in *Superintendent of Insurance v. Bankers L & C Co.* ——— U.S. ——— 30 L.Ed.2d 128, stating:

> "The Congress made clear that 'disregard of trust relationships by those whom the law should regard as

*"Under the provisions of Section 6 and 8 of the Limited Partnership Agreement of Penn Associates dated May 4, 1956, the General Partners may at any time elect to terminate the Partnership. Pursuant to the provisions of *these* Sections, the General Partners have elected to return to the Limited Partners the balance of their capital contributions, and to terminate the Limited Partnership, effective March 31, 1968."

> fiduciaries, are all a single seamless web' along with manipulation, investor's ignorance, and the like. * * * Hence we do not read § 10(b) as narrowly as the Court of Appeals; it is not 'limited to preserving the integrity of the securities markets' (430 F2d, at 361), though that purpose is included. Section 10(b) must be read flexibly, not technically and restrictively. Since there was a 'sale' of a security and since fraud was used 'in connection with' it, there is redress under § 10(b), whatever might be available as a remedy under state law. * * * The controlling stockholder owes the corporation a fiduciary obligation – one 'designed for the protection of the entire community of interests in the corporation – creditors as well as stockholders.' Pepper v. Litton, 308 US 295, 306-307, 84 L Ed 281, 288, 289, 60 S Ct 238." *Id.*, at p. 133-134.

The General Partners who were in sole control of the partnership made no attempt to turn the leasehold asset of the partnership into a capital gain profit to be shared in by all partners. Instead, they utilized their position of control to appropriate and convert the lease. *Meinhard v. Salmon*, 249 N.Y. 458.

The Circuit Court overlooked what a different panel than the one sitting in the instant case said in *Brod v. Perlow*, 375 F.2d 393 (2 Cir. 1967):*

> The facts alleged in the complaint are not the garden type variety of fraud. Where jurisdiction is questioned these facts are to be accepted as true. And, the complaint should not have been dismissed, if, under any reasonable reading, it states a

*"[We do not] think it sound to dismiss a complaint merely because the alleged scheme does not involve the type of fraud that is 'usually associated with the sale or purchase of securities.' We believe that § 10(b) and Rule 10b-5 prohibit all fraudulent schemes in connection with the purchase or sale of securities, whether the artifices employed involve a garden type variety of fraud, or present a unique form of deception. Novel or atypical methods should not provide immunity from the securities laws." Id., at 397.

claim upon which relief can be granted. If reformation of the partnership agreement is needed, then this equitable remedy is permissible in a Federal Securities Law violation action (section 77v, Title 15, USC). *Coffee v. Permion Corporation*, 434 F2d 383 (5th Cir. 1970); *Hooper v. Mountain States Securities Corporation*, 282 F2d 195 (5th Cir. 1960).

The questions raised herein will clarify the scope of section 10(b) and Rule 10b-5 in many actions involving contractual and fiduciary relationships on which the Court of Appeals opinion has ruled erroneously and which should be resolved by this Court.

II.

The decision appealed from conflicts with the decision of the Court of Appeals for the Seventh Circuit in *Allico National Corp. v. Amalgamated Meat Cutters & Butcher W.*, 397 F2d 727 (1968).

Petitioners are in an analogous position as the plaintiffs in *Allico National Corp. v. Amalgamated Meat Cutters & Butcher W.*, 397 F2d 727 (7th Cir. 1968). That case also involved a breach of contract. The defendants had agreed to sell certain shares of stock to plaintiffs. When after an elapse of time the defendants realized the stock had appreciated in value, they sold them to others, profiting by an additional $500,000. It was held, the defendants wrongful conduct was motivated by increased profit and in connection with its transaction with plaintiff. The Seventh Circuit held that defendants conduct was a device or scheme which operated as a fraud or deceit on plaintiffs whereby defendants were unjustly enriched and was actionable under Section 10b, Rule 10b-5 and Section 17(a). By affirming the dismissal of the complaint the Circuit Court below is squarely in conflict with the decision of the Seventh Circuit in *Allico National Corp. v. Amalgamated Meat Cutters & Butchers W., supra.* The conflict justifies the grant of certiorari to review the judgment below.

III.

Petitioners were "Forced Sellers". The purchaser-seller restriction should be abolished.

The Court below in reaching its conclusion to affirm the dismissal of the complaint for want of federal jurisdiction narrowly determined the petitioners were not "forced sellers" since they "refused to sign papers evidencing the return of their capital".* In considering whether the declaration of termination of the partnership by the respondents constituted a "forced sale" as to the five petitioners who did not sign the papers, the question is: –what was the limited partners position after the general partners declaration that the partnership was terminated? It must be answered –they no longer had a security interest. This is in effect respondents' position. The repayment of the limited partners capital is only a formality. *SEC v. National Securities*, 393 U.S. 453 (1968); *Vine v. Beneficial Finance Co.*, 374 F2d 627 (2d Cir. 1967) cert. denied 389 U.S. 970 (1967); *Coffee v. Permian Corporation*, 434 F2d 383 (5th Cir. 1970).

In assuming the petitioners were not "forced sellers" the Circuit Court, in effect, utilized the purchaser-seller restriction enunciated in *Birnbaum v. Newport Steel Corp.*, 193 F2d 461 (2d Cir. 1952) cert. denied, 343 U.S. 1956 (1952) which should be abolished as a standard for actions under Rule 10b-5. In this case it results in unjust enrichment of the respondents in

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*This assumption is not a fact. Petitioners, Harold Siegel, Hyman Freydberg, Jacob Kriveloff, Agnes Shoemaker, etc., did sign the papers proferred by the General Partners and their capital was returned to them.

violation of all concepts of partnership and fiduciary obligation law. This is a case that certainly merits petitioners not be limited to the purchaser-seller doctrine whereby defendants escape accounting for profits and in the process are unjustly enriched. 111 Loss, Securities Regulations, Second edition 1794; *Janigan v. Taylor,* 344 F2d 781, (1st Cir. 1965).

This Court has never ruled on the purchaser-seller doctrine as determining Federal Securities Law jurisdiction to sue. Since this case clearly raises the issue, the Court should resolve it by granting the writ of certiorari.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari to review the judgment and opinion of the Second Circuit should be granted.

Respectfully submitted,

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February 1972.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 107—September Term, 1971

(Argued October 6, 1971 Decided November 3, 1971.)

Jacog FERSHTMAN et al.,
Plaintiffs-Appellants,

v.

Herman J. SCHECTMAN et al.,
Defendants-Appellees.

Before FRIENDLY, Chief Judge, WATERMAN and SMITH, Circuit Judges.

Appeal from an order of the District Court for the Southern District of New York, Edward C. McLean, *Judge*, dismissing, on motion, a complaint seeking to invoke federal jurisdiction on the basis of alleged violations of the Securities Act of 1933, the Securities Exchange Act of 1934, and the SEC's Rule 10b-5.

Affirmed.

Friendly, J.

This case represents another attempt to invoke the antifraud provisions of federal securities legislation and the SEC's Rule 10b-5 to confer federal jurisdiction in a situation to which the statutes and rule do not apply.

Plaintiffs-appellants are nine of forty-seven limited partners in Penn Associates (Penn) suing both individually and

derivatively. Defendants are the general partners of Penn, Arthur Young & Company (Penn's accountants), and the 461–8th Avenue Corporation. Although the complaint is long and diffuse and contains many immaterial allegations, the nub of it is this:

The general partners formed Penn pursuant to a limited partnership agreement dated May 4, 1956, for the purchase of a lease, expiring November 30, 1971, and a partially amortized second mortgage on a parcel of real estate consisting of an office building at 461 Eighth Avenue, New York City, and an adjoining parking lot. The purchase was actually effected through the 461–8th Avenue Corporation, an entity wholly owned by the general partners. Penn loaned 461–8th Avenue its entire contributed capital, and took the second mortgage as security. Of the $730,000 stated capital of Penn, $400,000 was contributed by the limited partners, and $330,000 by the general partners. The general partners did not contribute their own funds, but rather took a bank loan for their stated commitment, posting the mortgage as security. This arrangement was clearly authorized by paragraph 15 of the partnership agreement.

The contributions of the limited partners were to be repaid at the rates of 4% per annum for the first five years of the partnership, 6% for the sixth through ninth years, and 8% for the tenth through fifteenth years. The annual net profits were to be divided so that the limited partners would receive 12% on the existing balance of their capital contributions plus their *pro rata* share of 25% of all rentals in excess of $815,000 in any one year.

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Paragraph 6 of the partnership agreement provided:

> 6. The partnership shall commence on the date of filing the Certificate of Limited Partnership in the Office of the County Clerk of New York County. The partnership shall terminate on the 30th day of November, 1971, unless sooner terminated by either:
>
> (a) a sale of the leasehold on the office building; or
>
> (b) repayment of the contributions of the Limited Partners in full, as is more particularly hereinafter set forth; or
>
> (c) retirement, death or insanity of a General partner.

The cross-reference in subparagraph (b) was to paragraph 8, which read:

> 8. The contributions of the Limited Partners to the capital of the partnership may be returned to them in whole, or in part, at any time, in the sole discretion of the General Partners, provided that all repayments of capital shall be pro rata among all the Limited Partners, subject to the provisions of paragraph 14.

Paragraph 14 provided that if a collateral agreement between Penn and 461–8th Avenue Corporation should be cancelled by reason of the sale of the leasehold, the limited partners should be entitled to receive the balance of their capital contributions, interest at the rate of 12% per annum on these since the commencement of the current fiscal year or the most recent profits distribution, and a portion of the capital gain realized on

Appendix A

such sale in the proportion that the capital contribution of each limited partner bore to the total capital of $730,000. Finally, paragraph 13(b) gave the general partners the right to modify the agreement between Penn and 461–8th Avenue Corporation so as to extend the lease beyond November 30, 1971, and explicitly provided that "Such renewal or extension shall not extend the life of the limited partnership past the time set for termination in paragraph 6 herein."

The venture proved highly successful. As of March 31, 1968, a date whose significance will later appear, a limited partner making an initial capital contribution of $10,001.00 would have been repaid $6600 and would have received (or be entitled to receive) $13,426.75 in profits on the diminishing capital balances, an average return of some 18% per annum.

The rift in the lute developed when the general partners, having previously caused 461–8th Avenue Corporation to obtain a 20-year extension of the lease from January 1, 1968, sent the limited partners a notice, dated March 29, 1968, wherein the former "elected to return to the Limited Partners the balance of their capital contributions, and to terminate the Limited Partnership, effective March 31, 1968." Attached to the letter was a schedule, prepared by defendant Arthur Young & Company, showing the unreturned capital contributions and the undistributed profits to which each limited partner was entitled. The limited partners were requested to communicate with Penn's counsel to obtain the papers they would have to execute in order to obtain these balances. Most of the limited partners did this. Three of them, who are plaintiffs in another action in the District Court for the Southern District of New

Appendix A

York wherein federal jurisdiction is predicated solely on allegations of diverse citizenship, and the nine who are plaintiffs in this action, did not.

The complaint here claimed that "the cause of action hereinafter alleged arises under Section Nos. 12(2) and 17(a) of the Securities Act of 1933 as amended and Section 10(b) of the Securities Exchange Act of 1934 as amended, and Rule 10b-5 * * * of the Securities and Exchange Commission promulgated thereunder; and Section 352-c of the General Business Laws of the State of New York."[2]

The complaint, in addition to asking compensatory and punitive damages of $2,000,000 for the class of limited partners, a figure seemingly plucked from the atmosphere, appears to have as its main objective, a decree requiring continuation of the partnership. It alleges a wide variety of misrepresentations and non-disclosures in connection both with plaintiffs' purchase of the limited partnership interests[3] in 1956 and with their "forced sales" pursuant to the termination of the partnership in 1968. With respect to the former, it suffices to say that, with one exception hereafter discussed, none of the alleged misrepresentations and non-disclosures are shown either to have been material within this court's definition in *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 848-850 (2 Cir. 1968), *cert. denied*, 394 U.S. 976 (1969), or, to have caused any damage. With respect to the latter, if defendants were legally entitled to terminate the partnership on March 31, 1968, in their sole discretion, it would make no difference what they misrepresented or concealed, even if we assume in plaintiff's favor that this transaction constituted a sale. *See Levine v. Seilon, Inc.*, 439 F.2d 328, 332 (2 Cir. 1971); *Drachman v. Harvey*, — F.2d —, — (2 Cir. 1971), *reh'g in banc granted*, 2 Cir., September 21, 1971.

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The one matter alleged in the complaint that may, or may not, give plaintiffs rights of some sort is this: In April, 1956, the limited partners were sent copies both of the partnership agreement, whose provisions with respect to termination have been quoted, and the certificate of Limited Partnership which was to be filed in the office of the county clerk. Paragraph 8 of the certificate read as follows:

> The contributions of the Limited Partners to the capital of the partnership may be returned to them in whole, or in part, at any time, in the sole discretion of the General Partners, provided that all repayments of capital shall be pro-rata among all the Limited Partners, and further provided that in the event of the sale of the leasehold on premises 461 Eighth Avenue, New York City, the balance of the contribution of each Limited-Partner shall be repaid in full.

This differed from the corresponding paragraphs of the partnership agreement in failing to make clear that in the event of the sale of the leasehold, the limited partners were also entitled to share *pro rata* in any capital gain. Kaine, who had taken the lead in recruiting some of the limited partners and is a plaintiff in the other federal action, called defendant Sidney Schectman, one of the leaders of the general partners, in regard to the discrepancy and, allegedly, a clarification of what events could terminate the partnership. This call produced a letter from Schectman stating that "We have a clarification on the provisions of paragraph 8 in the Certificate of Limited Partnership as outlined by Mr. Russell Wilde our attorney." The letter continued, "With specific reference to your inquiry, I quote." The quote was as follows:

> "A question has arisen with respect to the provisions of paragraph 8 in the Certificate of Limited Partnership

concerning the rights of the general partners to pay off the limited partners. The Certificate of Limited Partnership is filed in the County Clerk's Office and is to give notice to the public concerning the rights and obligations of the partnership. The rights, however, as set forth in that agreement are not controlling. The agreement that is controlling concerning the limited partnership is the partnership agreement itself. Paragraph 8 in that agreement provides that the general partners can only pay off the limited partners in the event that the leasehold of the office building is sold.

It is our understanding that the provisions of the limited partnership agreement will be the controlling provisions and that you, as a limited partner, may disregard the provisions of the Certificate of Limited Partnership. The reason no change was made in the Certificate of Limited Partnership prior to its filing was that time was of the essence and it had to be filed and no changes could be made within the time permitted."

The last sentence of the first paragraph not only went beyond the discrepancy between the certificate of limited partnership and the partnership agreement but was manifestly wrong. Perhaps what the attorney meant was that if the leasehold were sold, the general partners could not pay off the limited partners simply by returning their capital contributions and their stipulated share in profits to the date of sale. However, the language not only failed to convey this, but also misstated the conditions upon which the general partners could return the limited partners' contributions.

[2,3] Despite this we are unable to see how transmission of the attorney's view, even if we assume this came to plaintiffs'

attention, gives rise to a claim under the securities laws. It may well be that, upon discovering the difference between the letter and the partnership agreement, plaintiffs would have been entitled to rescission under § 12(2) of the 1933 Act, but this is the last thing they now desire. In an ordinary tort action for damages they would encounter the obstacle of contributory negligence, at least if the attorney's misstatement was merely negligent as distinguished from being fraudulent, see ALI, Restatement of Torts 2d § 552-A, contrast § 545-A (Tent. Draft No. 10, 1964), and, while we need not decide the point, we would suppose that if an action lies for damages as a result of negligent misrepresentation under the securities laws, the same would be true. See Note, Civil Liability under Section 10B and Rule 10B-5, 74 Yale L.J. 658, 688-89 (1965). Beyond that plaintiffs have suffered no damage from making their investments; rather they have reaped large profits. What they are really seeking is reformation of the partnership agreement to conform to the attorney's characterization of it. But we have held very recently that even a buyer defrauded in violation of the securities laws "is entitled to recover only the excess of what he paid over the value of what he got, not * * * the difference between the value of what he got and what it was represented he would be getting. * * *" *Levine v. Seilon, Inc., supra*, 439 F.2d at 334. Plaintiffs' efforts to bring themselves within the rule applied by some courts in favor of defrauded sellers confront the obstacle that if the partnership agreement governed, there was no fraud in connection with what they term a forced sale. On the other hand, if the letter on which they rely had the effect of reforming the terms under which the partnership could be terminated, their refusal to sign papers evidencing the return of their capital and their share of the profits was proper, and they are not "forced sellers" in any sense. All that they have is a claim for reformation based on state law.[4]

Appendix A

The district court dismissed the complaint for failure to state a claim on which relief could be granted. We think the dismissal should have been for want of federal jurisdiction. With that modification, the order is affirmed.

1. While plaintiffs frequently compare this to the conduct condemned in *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928), the pellucid provision of paragraph 13 of the partnership agreement, cited above, makes the reference fall rather flat.

2. In view of our holding that the complaint did not state a claim under the federal securities laws, we need not consider the applicability of the New York statute. See *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 829 (2 Cir. 1964), *cert. denied*, 381 U.S. 915, 85 S.Ct. 1534, 14 L.Ed.2d 435 (1965).

3. Defendants concede these to have been "securities" within the meaning of the 1933 and 1934 Acts.

4. In light of the foregoing discussion, we need not consider the defenses of the statute of limitations and the special arguments presented by defendant Arthur Young & Company.

Appendix B — OPINION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JACOB FERSHTMAN, HAROLD SIEGEL, ISABEL WEST, ZITA GARFIELD, LARRY SOMMA, HYMAN FREYDBERG, RENA KLEIN, JACOB KRIVILOFF, AGNES SHOEMAKER, as Executrix of the Estate of ROBERT SHOEMAKER, individually and as Limited Partners of PENN ASSOCIATES, a New York Limited Partnership,

Plaintiffs,

-against-

HERMAN J. SCHECTMAN, SIDNEY P. SCHECTMAN, JOHN D. BUSSEL, HENRY SPELLMAN, GEORGE ZUCKERMAN, individually and as General Partners of PENN ASSOCIATES, PENN ASSOCIATES, 461-8TH AVENUE CORPORATION, ROSE W. GROSS as Executrix of the Estate of SIMEON F. GROSS and ELLIOT S. GROSS, co-partners doing business under the firm and style of "Simeon F. Gross and Elliot S. Gross," ROSE W. GROSS as sole distributee of the Estate of SIMEON F. GROSS, ELLIOT S. GROSS and ARTHUR YOUNG & COMPANY,

Defendants.

McLEAN, D.J.

This action involves a controversy between nine limited partners and five general partners of Penn Associates, a New York limited partnership, organized in May 1956 for the purpose, according to the partnership agreement, of "the operation, management and control of premises No. 461 Eighth

Avenue, New York City . . . and the ownership of the second mortgage on the fee of said premises." All the defendants move to dismiss the action for failure to state a claim, and the defendants other than Arthur Young & Company also move for a variety of other relief.

Prior to the institution of this action, another action was begun in this court entitled *Kaine, et al. v. Schectman, et al.*, 68 Civ. 2305, by three limited partners against the general partners and Penn Associates and 461 8th Avenue Corporation. Plaintiffs in that action are represented by the attorney who also represents the present plaintiffs. That action has been actively litigated and is still undetermined. Subject matter jurisdiction of that action is based on diversity of citizenship, the three plaintiffs being residents of Florida, whereas defendants are residents of New York. A motion by plaintiffs in that action to join Arthur Young & Company as a defendant was denied by Judge Pollack on September 9, 1969.

The nature of plaintiffs' claims and the relief asked in the two actions is very similar, with the exception that the Kaine action charges only a violation of state law, whereas the complaint in the present Fershtman action charges a violation of the federal securities laws. It is apparent that the present action is an attempt by limited partners who could not join the Kaine action because they are New York residents to maintain an action in this court similar to Kaine's against the same persons who are defendants in the Kaine action, and also against additional defendants whom Kaine was not permitted to sue in his action. Whether the present plaintiffs can accomplish this purpose depends upon whether their complaint states a federal claim under the securities laws, specifically Sections 12(2) and 17(a) of the Securities Act of 1933, and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder.

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The "securities" are the interests in the limited partnership. No one disputes that these interests constitute securities within the meaning of the 1933 and 1934 Acts and for present purposes I will assume that they do. Plaintiffs are the buyers of these securities. The sellers are the general partners. The purchase took place in May 1956. Plaintiffs claim that the general partners induced plaintiffs to purchase their respective interests by affirmative misrepresentations and by concealing material facts. Most important of the affirmative misrepresentations is the statement allegedly made by the general partners that the partnership would continue until "(1) the lease on said premises or renewals thereof was sold or (2) terminated." Plaintiffs' principal grievance is that on March 29, 1968, almost twelve years after the purchase by plaintiffs of their limited partnership interests, the general partners notified plaintiffs that they had terminated the partnership, even though the lease had not been sold, but in fact had been renewed until December 31, 1988. There are other alleged misrepresentations in this exceedingly prolix complaint, but this seems to be the nub of the matter.

Alleging that this termination of the partnership in 1968 was "illegal, unlawful and in violation of the partnership laws of the State of New York," plaintiffs ask judgment (1) declaring 461 8th Avenue Corporation, Penn Associates and the general partners to be constructive trustees for Penn Associates and for plaintiffs of the leasehold, (2) requiring defendants "to account to Penn Associates as to the tax advantages" of certain transactions between Penn Associates and 461 8th Avenue Corporation, (3) "decreeing the interests of the plaintiffs and members of their class and the Managing Partners in accordance to their cash equity capital contributions to Penn Associates," and (4) "requiring defendants to account" for compensatory and punitive damages in the sum of $2,000,000.

Before considering whether this amounts to a claim under the federal securities laws against the general partners, I will first consider the case as to Arthur Young & Company, who was the accountant for the partnership. The complaint alleges that Arthur Young & Company "aided and abetted the Managing Partners in their misrepresentations, fraud, deceit and conspiracy hereinafter alleged." It alleges further that all the defendants "engaged in a continuing agreement, understanding, concert of action, plan, scheme and conspiracy" in the sale of the securities of Penn Associates to the plaintiffs. More specifically, the complaint alleges that Arthur Young & Company "caused false and improper statements and income tax returns to be prepared and distributed showing distribution of income to the limited partners." This allegation refers to events subsequent to the sale of the limited partnership interests to plaintiffs in 1956.

It is tolerably clear from the face of the complaint that Arthur Young & Company was not a seller of these limited partnership interests.* The conclusory allegation that it "aided and abetted" the sellers and "conspired" with the sellers is not enough to charge Arthur Young & Company with being a seller itself.

* Any possible uncertainty that conceivably could exist from the face of the complaint as to the nature of plaintiffs' real claim against Arthur Young & Company is dispelled by a lengthy affidavit submitted in opposition to this motion by plaintiffs' attorney. The affidavit is improper on a motion addressed to the face of the complaint, but reading it leaves no doubt that what plaintiffs are claiming is that Arthur Young & Company, in its capacity as accountant of the partnership, incorrectly handled the accounting.

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Barlas v. Bear, Stearns & Company, 64-66 CCH Sec.L.Rep. paragraph 91674 (N.D. Ill. 1966)

As far as this defendant is concerned, the complaint seems to me to be a transparent attempt to state a federal claim against Arthur Young & Company when none in fact exists. Plaintiffs are at Liberty to sue Arthur Young & Company, if they so desire, in the state court, but they may not maintain this action against it here. For this reason, as well as for the additional reason discussed hereinafter with respect to the claim against the general partners, the complaint does not state a claim against Arthur Young & Company.

The other new defendants, not sued in the Kaine case, are the Gross defendants, *i.e.*, Rose W. Gross, as executrix of the estate of Simeon F. Gross, and Elliot S. Gross, co-partners doing business under the firm and style of "Simeon F. Gross and Elliot S. Gross," Rose W. Gross, as sole distributee of the estate of Simeon F. Gross, and Elliot S. Gross. Simeon Gross, now deceased, and Elliot Gross were the lawyers for the general partners. There is no direct allegation that they sold any securities to plaintiffs. As in the case of Arthur Young & Company, they are said to have "aided and abetted" the managing partners in their misrepresentations, and to have been parties to the "conspiracy." More specifically, the complaint charges the Grosses, in substance, with being dummy officers, directors and stockholders of 461 8th Avenue Corporation "for the sole purpose to conceal the true beneficial interest and identity of the Managing Partners of Penn Associates as the controlling stockholder, officers and director principals in 461 8th Avenue Corporation." According to the complaint, Simeon Gross died on December 31, 1963, some seven years after plaintiffs purchased their partnership interests, and it was "subsequent to the date of the death of said Simeon F. Gross"

that the managing partners became officers, directors and record owners of the stock of 461 8th Avenue Corporation.

Whatever kind of claim these allegations may be thought to allege against the Grosses, I do not think that the complaint can fairly be construed to allege that the Grosses were sellers of securities within the meaning of the federal securities laws. What has been said with respect to plaintiffs' claim against Arthur Young & Company applies to their claim against the Grosses as well.

This brings us to the claim against those defendants who have previously been sued in the Kaine action, *i.e.*, the general partners, Penn Associates and 461 8th Avenue Corporation. Penn Associates appears to have been named a defendant because the plaintiffs purport to sue on its behalf, although there would seem to be no basis for such a derivative action under the securities laws, since there is no allegation that Penn Associates purchased any partnership interest in itself. Just what plaintiffs' theory is as to 461 8th Avenue Corporation is wholly unclear. In any event, there is no allegation that this defendant sold securities to plaintiffs. As far as the general partners are concerned, however, there is no doubt that the complaint alleges that they were the sellers of the securities purchased by plaintiffs and that they sold them to plaintiffs on the strength of material misrepresentations and omissions.

The general partners base their motion to dismiss upon the contention that the complaint does not allege that the misrepresentations which induced plaintiffs to purchase the partnership interests in 1956 have caused plaintiffs any damage, or, at any rate, the type of damage recoverable for violations of the sections of the 1933 and 1934 Acts which plaintiffs claim were violated.

This contention is clearly correct as far as Section 12(2) of the 1933 Act is concerned. The complaint does not allege that plaintiffs have disposed of the securities, i.e., their partnership interests. Under these circumstances, Section 12(2) expressly limits plaintiffs to the right to "recover the consideration paid for such security with interest thereon . . . upon the tender of such security." In other words, plaintiffs' only remedy under this section is rescission.

Pfeffer v. Cressaty, 225 F. Supp. 756 (S.D.N.Y. 1963)

Plaintiffs do not allege any tender. It is manifest that they are not seeking rescission here. On the contrary, they seek to enforce their interest in the partnership.

After careful examination of the complaint, I have concluded that defendants are also correct as to the other sections involved, Section 17(a) of the 1933 Act, and Section 10(b) of the 1934 Act and Rule 10b-5. The damages recoverable for misrepresentations "in the offer or sale of any securities" (Section 17(a)) or "in connection with" the sale of any securities (Section 10(b) and Rule 10b-5) are tort damages representing plaintiffs' out-of-pocket loss. The rule has been stated, with the citation of many supporting authorities, in *Estate Counseling Service v. Merrill, Lynch, Pierce, Fenner & Smith, Incorporated*, 303 F.2d 927, 533 (10th Cir. 1962), as follows:

> "In the Federal courts the measure of damages recoverable by one who through fraud or misrepresentation has been induced to purchase bonds or corporate stock, is the difference between the contract price, or the price paid, and the real or actual value at the date of the sale, together with such outlays as are attributable to the defendant's conduct.

(or in other words, the difference between the amount parted with and the value of the thing received."

Plaintiffs are entitled to what they have lost, not to what they might have gained as the fruits of an unrealized speculation.

This complaint contains no allegations which fit this theory of recovery. Despite all its repetitious verbiage, it is reasonably plain from the complaint, read as a whole, that plaintiffs' grievance lies in the fact that the managing partners, many years after plaintiffs purchased their partnership interests, attempted to terminate the partnership. Essentially, plaintiffs' claim is one for breach of contract. The relief asked by plaintiffs, the declaring of the general partners to be "constructive trustees," the decreeing of the interests of the parties in the partnership "in accordance to their cash equity capital contributions," the requiring the general partners to account, etc., etc., is not in any sense the type of relief appropriate to an action for damages for violation of Sections 17(a) and 10(b).

These plaintiffs are asserting substantially the same claims as the Kaine plaintiffs asserted. These are state claims. They do not become federal claims merely by characterizing them as violations of the federal securities laws. There has to be some limit to the extent to which Section 17(a) and Section 10(b) can be stretched to encompass matters which they cannot reasonably be construed to include.

The motion of all defendants to dismiss the action for failure to state a claim is granted.

So ordered.

Dated: April 8, 1971

s/ Edward C. McLean
U.S.D.J.

APPENDIX C

SIDNEY P. SCHECTMAN
1440 Broadway
New York 18, N.Y.
May 14, 1956

Mr. Albert Kaine
300 Hayward Avenue
Mt. Vernon, New York

Re: Penn Associates

Dear Al:

We have a clarification on the provisions of paragraph 8 in the Certificate of Limited Partnership as outlined by Mr. Russell Wilde our attorney.

With specific reference to your inquiry, I quote:

"A question has arisen with respect to the provisions of paragraph 8 in the Certificate of Limited Partnership concerning the rights of the general partners to pay off the limited partners. The Certificate of Limited Partnership is filed in the County Clerk's Office and is to give notice to the public concerning the rights and obligations of the partnership. The rights, however, as set forth in that agreement are not controlling. The agreement that is controlling concerning the limited partnership is the partnership agreement itself. Paragraph 8 in that agreement provides that the general partners can only pay off the limited partners in the event that the leasehold of the office building is sold.

It is our understanding that the provisions of the limited

partnership agreement will be the controlling provisions and that you, as a limited partner, may disregard the provisions of the Certificate of Limited Partnership. The reason no change was made in the Certificate of Limited Partnership prior to its filing was that time was of the essence and it had to be filed and no changes could be made within the time permitted."

I hope that this will satisfy your questions. We would rather have had more time, but there would have been no sense in losing a month's profits.

Best wishes.

Cordially yours,

s/ Sid

Sidney

SPS/sb

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Jacob FERSHTMAN et al.,
Plaintiffs-Appellants,

v.

Herman J. SCHECTMAN et al.,
Defendants-Appellees.

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Henry J. Friendly, Chief Judge

Sterry R. Waterman, USCJ

J. Joseph Smith, Circuit Judge

November 26, 1971.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of November one thousand nine hundred and seventy-one.

Present:

HON. HENRY J. FRIENDLY

Chief Judge

HON. STERRY R. WATERMAN

HON. J. JOSEPH SMITH

Circuit Judges.

Jacob FERSHTMAN et al.,
Plaintiffs-Appellants,

Herman J. SCHECTMAN et al.,
Defendants-Appellees.

Appendix E

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed as modified in accordance with the opinion of this court with costs to be taxed against the appellants.

A. DANIEL FUSARO
Clerk

[seal]

A true copy;
s/ A. Daniel Fusaro, Clerk

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1075

JACOB FERSHTMAN, HAROLD SIEGEL, ISABEL WEST, ZITA GARFIELD, LARRY SOMMA, HYMAN FREYDBERG, RENA KLEIN, JACOB KRIVILOFF, AGNES SHOEMAKER, as Executrix of the Estate of ROBERT SHOEMAKER, individually and as Limited Partners of PENN ASSOCIATES, a New York Limited Partnership,

Petitioners,

–against–

HERMAN J. SCHECTMAN, SIDNEY P. SCHECTMAN, JOHN D. BUSSEL, HENRY SPELLMAN, GEORGE ZUCKERMAN, individually and as General Partners of PENN ASSOCIATES, PENN ASSOCIATES, 461 8TH AVENUE CORPORATION, ROSE W. GROSS, as Executrix of the Estate of SIMEON F. GROSS and ELLIOT S. GROSS, co-partners doing business under the firm and style of "Simeon F. Gross and Elliot S. Gross", ROSE W. GROSS as sole distributee of the Estate of SIMEON F. GROSS, ELLIOT S. GROSS and ARTHUR YOUNG & COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM G. MULLIGAN
MULLIGAN & JACOBSON
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1075

JACOB FERSHTMAN, *et al.*,

Petitioners.

—against—

HERMAN J. SCHECTMAN, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully pray that no writ of certiorari issue in this proceeding. The petition for a writ of certiorari was received by respondents February 22, 1972.

QUESTIONS PRESENTED

1. When plaintiffs base federal jurisdiction on § 17(a) of the Securities Act of 1933 and § 10(b) and Rule 10-b-5 of the Securities Exchange Act of 1934 and allege in their complaint that they were induced to purchase limited partnership interests by means of misrepresentations, but do not allege any damage to them resulting from such purchases, was the Court below in error in affirming the dismissal of the complaint for want of federal jurisdiction?

2. When the general partners of a limited partnership terminated the interests of the limited partners unilaterally and pursuant to an absolute power to terminate such interests in their sole discretion contained in the agreement of limited

partnership entered into by the limited partners and the general partners twelve years prior to the termination, was the Court below in error in affirming the dismissal of the complaint for want of federal jurisdiction on the ground that the termination did not violate § 10(b) and the Securities Exchange Act of 1934 or Rule 10-b-5 thereunder?

STATEMENT OF THE CASE

A. Jurisdiction and Parties

This is an action purportedly brought under § 22(a) of the Securities Act of 1933 and § 27 of the Securities Exchange Act of 1934 (15 U.S.C. § 77-v and § 78-aa) in that the claim is alleged to arise under Section 12(2) and 17(a) of the 1933 Act and Section 10(b) of the 1934 Act and Rule 10-b-5 promulgated thereunder. No other basis for federal jurisdiction is alleged in the complaint., Petitioners have apparently abandoned their allegation that Section 12(2) of the Securities Act of 1933 was breached by defendants. The texts of § 17(a) and § 10(b) and Rule 10-b-5 are set forth at pages 3-5 of the petition for certiorari.

The "securities" in question are limited partnership interests in Penn Associates, sold to petitioners in 1956, in connection with which certain misrepresentations were allegedly made. Petitioners purported to sue as limited partners which they allege in ¶ "5" of the complaint (Appendix, 3a) they now are, and derivatively on behalf of Penn Associates. The complaint is annexed hereto as Appendix A and appears at pages 1a-16a of the Appendix, *infra*.

Petitioners state to this Court (Petition, p. 6) that they seek to recover $2,000,000 "compensatory damages" herein. In the ad damnum clause of the complaint the same $2,000,000 appears as "compensatory and punitive damages" (Appendix, 15a) but it appears in ¶ 37 of the complaint that the $2,000,000 is solely "punitive damages". (Appendix, 15a). The Court of Appeals referred to this $2,000,000 as "a figure seemingly plucked from the atmosphere . . .". (Petitioners' Appendix, 5a)

B. The Facts

Rule 23(1)(c) of the Rules of this Court directs that the petition contain "a precise statement of the case containing the facts material to the consideration of the questions presented." Since the question presented to this Court is whether the Court of Appeals, whose decision petitioners seek to review, was in error in affirming the dismissal of the complaint for failure to state a federal claim for relief, the "facts" set forth in the petition which purport to describe the formation of the limited partnership, the execution of the limited partnership agreement and what petitioners discovered on deposition in the "Kaine" action are clearly irrelevant since these "facts" nowhere appear in the complaint that was dismissed.

However, even were these "facts" part of the complaint and assuming contrary to fact that they were true, they do not state a claim for relief for violation of federal securities laws and the complaint was properly dismissed.

Petitioners herein and plaintiffs in the "Kaine" action, referred to at page 10 of the petition (in which jurisdiction was based solely on diversity) claim to be limited partners of a partnership known as Penn Associates which was formed in 1956 to manage the leasehold of premises known as 461 8th Avenue. The leasehold was owned by the respondent corporation. The respondents Herman J. Scheetman, Sidney P. Scheetman, John D. Bussel, Henry Spellman and George Zuckerman were the general partners of Penn Associates and the shareholders of the respondent corporation and were, at all times, the beneficial owners of the stock of the defendant corporation.

The limited partnership agreement of Penn Associates dated May 4, 1956, a copy of which is annexed to the complaint in this action and appears in the appendix hereto as Appendix B at pages 17a-34a provides in ¶ 6 thereof for the termination of the partnership on the 30th day of November, 1971, unless *sooner* terminated by either a sale of the leasehold or the repayment of the contributions of the limited partners in full (Appendix, 21a). Such repayment could, pursuant to ¶ 8,

be made, at any time in the sole discretion of the general partners (Appendix, 21a). The agreement further provided in ¶ 13 thereof that the leasehold could be extended beyond November 30, 1971, the then termination date, but that such renewal or extension would not extend the life of the limited partnership past the time set for termination in ¶ 6 of the agreement, that is in all events not beyond November 30, 1971 (Appendix, 24a). In the face of petitioners' efforts to skirt ¶ 13, the Court of Appeals found this provision to be "pellucid". (Petitioners' Appendix, p. 9a, fn. 1.)

Paragraph 9 of the partnership agreement provides a schedule for the repayment of the capital contributions of the limited partners during the term of the agreement and upon its expiration (Appendix, 21a-22a). Paragraph 11 of the agreement provides that the *net profits* of the partnership would be divided ratably among the limited partners at the rate of 12% per annum of the then outstanding balance of the capital contribution of each limited partner (Appendix, 23a). Net profits are defined in ¶ 10 to mean the excess of gross receipts over the acquisition, operating and other expenses of the partnership. Partnership expenses include, but are not limited to, amortization, maintenance, repairs and replacement (Appendix, 22a-23a). All the net profits after the distribution to the limited partners of a 12% return on their outstanding capital belong *solely* to the general partners with the limitation that in addition to their 12% interest, the limited partners should share in 25% of the amount of rent actually collected from premises 461 8th Avenue in excess of $815,000 a year (Appendix, 23a). Nowhere in the complaint do petitioners allege that they did not receive their 12% return or their share of the rent at any time during the life of the partnership.

The limited partners enjoyed a most profitable experience. For the 11 years and 11 months during which the limited partnership continued, they received an average return of some 18% per annum on their outstanding capital (Petitioners' Appendix, p. 4a).

Paragraph 15 of the agreement (Appendix, 25a) gives to the general partners the absolute right to mortgage or pledge the

assets of the partnership for their own capital contribution in an amount not to exceed $300,000.

Pursuant to the rights afforded them in the partnership agreement, the corporate defendant and the general partners did negotiate an extension of the lease and the general partners did elect to terminate the limited partnership and to return to the limited partners their capital contribution in full.

The petition (pp. 7-8) attempts to make it appear that the execution of the limited partnership agreement was a hurried affair. None of these "facts" appears in the complaint, none is relevant to the issues on appeal, and respondents will not argue these matters of "fact".

The limited partners of Penn Associates made their investment primarily on the basis of favorable experience with the general partners in past investments. Far from being defrauded, the limited partners received an average annual return of 18% on their capital investment outstanding. Mr. Kaine was given by Mr. Schectman not only the pertinent figures relating to the investment but invited to examine the property for himself.

No representations were made to any limited partner that the general partners had cash to put into the venture. The partnership agreement, ¶ 15 (Appendix, 25a) clearly presumes that the general partners would borrow the funds for their investment.

The letter of Sidney Schectman, referred to at page 9 of the petition and reprinted in petitioners' appendix at 19a-20a, was written after the limited partnership agreement was signed and did not vary the clear provisions of that written agreement. On its face, it is apparent from the letter that Mr. Kaine had raised with Mr. Schectman at most a question of the meaning of ¶ 8 of the Certificate of Limited Partnership of Penn Associates, not of the limited partnership agreement. The letter correctly states that the partnership agreement controls, rather than the certificate, but then proceeds to give an erroneous interpretation of ¶ 8 of the limited partnership agreement, an interpretation the Court of Appeals found "manifestly wrong".

(Petitioners' Appendix, 7a) (Petitioners' truncated quotation from the letter at page 9 of the petition attempts to give the impression that Mr. Scheetman was personally assuring Mr. Kaine as to the termination of the agreement but a reading of the letter shows he was only passing on verbatim an erroneous interpretation by his then counsel of a paragraph of the agreement.) In fact, ¶ 8 of the partnership agreement clearly states that the general partners may at any time return to the limited partners their capital, provided that such return be pro rata, except that the pro rata distribution does not apply if ¶ 14 of the limited partnership agreement, which deals with sale of the leasehold, comes into effect, as it never did.

Petitioners indicate that the "Kaine" action was precipitated by counsel's discovery that the general partners had extended the lease. There was, of course, no reason to tell the limited partners the lease had been extended. By the terms of ¶ 13 of the partnership agreement, which the Court of Appeals found pellucid, the extension of the lease did not extend the life of the limited partnership.

The "undisclosed facts" supposedly ascertained on deposition in the "Kaine" action (Petition, p. 10, et seq.) are either untrue or immaterial or, if true, were known to petitioners for some time.

The termination of the limited partnership was accomplished by the letter to the limited partners dated March 29, 1968. The general partners could continue as a general partnership but the limited partnership had been terminated. The complaint makes no mention of this "undisclosed" fact allegedly learned in the "Kaine" proceeding.

The release of the parking lot and the very minor rent decline resulting was within the prerogative of the general partners as managers (Agreement, ¶ 20) (Appendix, 26a-27a). The general partners did not guarantee the limited partners any specific amount of excess rent but merely gave them a right to share in excess rent "actually collected". (Agreement, ¶ 11) (Appendix, 23a). In the event of a modification of the rent, the general partners personally guaranteed the limited partners their

return of 12% on outstanding capital (Agreement, ¶ 13) (Appendix, 24a). Again, one would search the complaint in vain for mention of a parking lot.

The general partners did not undertake to sell the lease but to share in capital gains if such sale was made before November 30, 1971, an event which never occurred. The agreement (¶ 18) (Appendix, 24a) clearly provided that an extended lease would belong to the general partners after the termination of the limited partnership.

That title to the lease was taken by the corporation appears in ¶ "7" of the "Kaine" complaint, part of the record herein, and was not a fact discovered on examination. It was never intended that the corporation be an asset of the partnership. The record herein shows that the stock of the corporation was held for the general partners who were the beneficial owners thereof. Petitioners so allege in ¶¶ 17 through 20 of their complaint (Appendix, 5a-7a).

The operating agreement between respondent corporation and the partnership was attached to, and made a part of, the limited partnership agreement. The general partners did not "siphon" the tax benefits of amortization and leasehold improvements to the corporation. Rather these benefits belonged to the general partners as did the net income of the partnership over the 12% return to the limited partners and their interest in excess rent. It was of little importance to the limited partners if the income and deductions undoubtedly belonging to the general partners were taken by them through the medium of the corporation.

The limited partners contracted to receive a 12% return on their investment from "net profits" and to share in excess rent (¶ 11). Net profits mean gross receipts after expenses, which expenses include amortization and the costs of repairs and replacements (¶ 10; Appendix, 22a-23a). Thus, the partnership agreement is clear that amortization and improvement tax benefits belong to the general partners as does any income to which the limited partners are not contractually entitled.

ARGUMENT

REASONS FOR DENYING THE WRIT

I. The Court Below Did Not Err In Dismissing The Complaint

Petitioners allege that jurisdiction of this action arises under § 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Rule 10-b-5 promulgated thereunder. No other basis for federal jurisdiction is claimed.

Respondents moved to dismiss the complaint on the grounds that the federal courts lacked jurisdiction and that the complaint failed to state a claim for relief. Petitioners attempted to come within the jurisdiction of the federal courts by alleging respondents sold them securities by means of misrepresentations and omissions contrary to the Securities Act of 1933 and the Securities Exchange Act of 1934. However, the complaint shows no damage to petitioners arising from these sales. Rather, any damage claimed comes from the alleged subsequent breach of fiduciary duty by respondents, unconnected with, and not a consequence of, the purchase or sale of securities. Lacking damages arising from the purchase or sale of securities, no claim for relief is pleaded under the sections of the securities laws cited by petitioners and no claim is alleged under any other federal law. Hence, there is no basis for the jurisdiction of the federal courts and the complaint was properly dismissed.

Petitioners did not plead that the securities they purchased were worth less than they paid for them at the time of purchase or thereafter or that they disposed of them at a loss. As to claims under any of the sections cited by petitioners for inducing purchase of stock by fraud, damages are measured by the out-of-pocket rule. *Estate Counseling Service v. Merrill Lynch, Pierce, etc.*, 303 F.2d 527 (10th Cir. 1962). For one induced to purchase securities by fraud, damages are solely the difference between the real value of the securities and the price paid, with interest and outlays legitimately attributable to defendants' conduct, but not damages covering the expected fruits of unrealized speculation. *Janigan v. Taylor*, 344 F.2d 781 (1st

Cir. 1965), cert. den. 382 U.S. 879 (1965); *West v. Zurhorst*, 280 F.Supp. 574 (S.D. N.Y. 1967). A failure to show such damages is a fatal defect. *Estate Counseling Service v. Merrill Lynch, supra*. In the instant case, not only do petitioners fail to allege damages from the purchase of the limited partnership interests, but it appears from the record and the Court of Appeals noted that petitioners received back their capital and an average return of some 18%.

The alleged violation of the Securities Acts must be the cause of the damage claimed or no claim for relief is pleaded under such acts. *Hoover v. Allen*, 241 F.Supp. 213 (S.D. N.Y. 1965). If the complaint fails to specify adequately a causal relation between the violation and the alleged damage no claim is pleaded. *Bound Brook Water Company v. Jaffe*, 284 F.Supp. 702 (D.N.J. 1968). Causation of damages is part of a private claim for relief for violation of the Securities Acts and cannot be read out of such claim. *Adair v. Schneider*, 293 F.Supp. 393 (S.D.N.Y. 1968); *West v. Zurhorst, supra; Hirsh v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, CCH Federal Securities Law Reporter Para. 92,616 (S.D.N.Y. 68 Civ.5183, decided March 20, 1970).

Plaintiffs in *Lester v. Preco Industries, Inc.*, 282 F.Supp. 459 (S.D.N.Y. 1965), alleged that in connection with the sale of securities defendants planned to and did commit acts of waste, siphon off corporate assets and so forth. The District Court said of this:

> "Every one of these allegations is a typical, common law charge of breach of fiduciary duty in the management of a corporation, and is not normally covered by the securities laws. Howard v. Furst, 238 F.2d 790 (2d Cir. 1956); Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir. 1952). The sale of the securities is only incidental to a major mismanagement issue. See Pettit v. American Stock Exchange, 217 F.Supp. 21, 25 (S.D.N.Y. 1963). Each item complained of occurred after the filing of the registration statement and the issuance of the prospectus and the sale of the stock.
>
> "The question presented to this Court, then, boils down to whether allegations of evil intent, purportedly

> entertained when the registration statement was filed but not carried out until a subsequent time, are sufficient to convert what would otherwise be a stockholders derivative suit into a suit for violation of the 1934 Act. It is the conclusion of this Court that they are not." 282 F.Supp. at 462.

In *Mutual Shares Corporation v. Genesco, Inc.*, 384 F.2d 540 (2d Cir. 1967), the Court of Appeals for the Second Circuit said:

> "Finally, any stockholder could plausibly argue that at the time of purchase he relied on an implied representation by management not to mismanage. Therefore, as the Commission's *amicus* brief points out, if plaintiffs' proposition were accepted, it would convert any instance of corporate mismanagement into a Rule 10b-5 case." 384 F.2d at 545.

Recently, in *Supt. of Insurance v. Bankers Life & Cas. Co.*, 404 U.S.6 (1971), this Court stated:

> "We agree that Congress by § 10(b) did not seek to regulate transactions which constitute no more than internal corporate mismanagement." 404 U.S. at 12

It would appear that petitioners are now admitting that they have pleaded no claim in connection with their purchase of limited partnership interests for their petition more or less ignores these purchases. Instead, the claim is made that when the general partners repaid to the limited partners their capital invested, a "forced sale" of securities was made in violation of § 10(b) and Rule 10-b-5. This would appear to be an afterthought of petitioners; there is no allegation of "sale", forced or otherwise, in the complaint.

It is significant that ¶¶ 22, 24, and 25 of the complaint which attempt to allege schemes to defraud, material misrepresentations and omissions in the language of the Securities statutes, allege such schemes, misrepresentations and omissions only in connection with the purchase by the limited partners of their interest in Penn Associates. One would search the complaint in vain for an allegation that the "sales" were made by means of interstate commerce or the mails. It appears both

in the complaint (Appendix, 12a-13a), and, in the partnership agreement annexed to the complaint (Appendix, 21a) that the termination of the partnership was made pursuant to the power to terminate given the general partners by ¶ 8 of the partnership agreement.

It should be noted that petitioners in their complaint (¶¶ 3 and 5) allege that they are now limited partners of Penn Associates. They take the position that the termination of their limited partnership interests was null and void (Complaint, ¶ 34). Hence, according to their own complaint, there has been no sale of their interest and no resulting damages.

However, even if a forced sale occurred, petitioners' complaint still fails to state a claim for relief. It appears in the complaint (¶¶ 28, 29) and from the notification of termination (Petition, p. 16) that the termination of the limited partnership interests was "unilateral" and based solely upon the right given to the general partners by the partnership agreement to repay the limited partners. Hence, even assuming there was non-disclosure or misrepresentation in connection with these sales, there was neither reliance on the deception by the petitioners or the other limited partners nor causation of damage by the deception.

The Court of Appeals for the Second Circuit ruled in *List v. Fashion Park, Inc.*, 340 F.2d 457 (2d Cir. 1965):

> "Disagreement centers on the applicability and meaning of the requirement that reliance be placed upon the misrepresentation. Our examination of the authorities satisfies us that this requirement also is carried over into civil suits under Rule 10b-5.***
>
> "This interpretation of Rule 10b-5 is a reasonable one, for the aim of the rule in cases such as this is to qualify, as between insiders and outsiders, the doctrine of *caveat emptor*—not to establish a scheme of investors' insurance. Assuredly, to abandon the requirement of reliance would be to facilitate outsiders' proof of insiders' fraud, and to that extent the interpretation for which plaintiff contends might advance the purposes of Rule 10b-5. *But this strikes us as an inadequate reason*

> *for reading out of the rule so basic an element of tort law as the principle of causation in fact.*" (Emphasis supplied)

Respondents did not induce petitioners or other limited partners to sell their interests to them because no inducement was necessary. Respondents acted pursuant to the rights given them by ¶ 6 and ¶ 8 of the partnership agreement to pay off the limited partners and they did not need the consent of any of the limited partners to do so. If respondents had deceived the limited partners in connection with the return to them of their capital, the limited partners nonetheless could not have relied on that deception to their harm because they had no choice except to be paid back. Paragraph 8 of the limited partnership agreement is clear that the limited partners could have their capital returned to them by the general partners "at any time, in the sole discretion of the General Partners" (Appendix, 21a).

When, as in the instant case, the defendants could consummate the purchase by them of the limited partnership interest regardless of what the limited partners did, the alleged "deception" could not cause the damages claimed and thus no claim is stated under § 10(b) or Rule 10-b-5. *Barnett v. Anaconda Company*, 238 F.Supp. 766 (S.D.N.Y. 1965); *Adair v. Schneider*, 293 F.Supp. 393 (S.D.N.Y. 1968); *Ryan v. J. Walter Thompson Company*, 322 F.Supp. 307 (S.D.N.Y. Jan. 29, 1971).

In *Levine v. Seilon*, 439 F.2d 328 (2d Cir., March 1, 1971), the Court of Appeals for the Second Circuit upheld the dismissal of a complaint under 10(b) where no causal relation was shown between the misrepresentation and any action by the plaintiff. That Court said in relevant part:

> "It is hardly realistic to accuse a corporation of having secured an unjustified windfall or enrichment as a result of a redemption which was legally and financially within its power to effectuate quite independently of any action by the shareholders whose stock was redeemed." 439 F.2d at 334.

Petitioners contend that respondents do not have the right to repay their capital before the expiration of the lease. As

stated above, if this were true, they made no sale to respondents and suffered no damages thereby. However, the limited partnership agreement is clear that the general partners had such a right. Paragraph 8 of that agreement reads (Appendix, 21a):

> "8. The contributions of the Limited Partners to the capital of the partnership may be returned to them in whole, or in part, at any time, in the sole discretion of the General Partners, provided that all repayments of capital shall be pro rata among all the Limited Partners, subject to the provisions of paragraph 14."

Paragraph 14 of the agreement reads (Appendix, 24a-25a):

> "14. In the event that the agreement dated the 4th day of May, 1956 between 461-8th AVENUE CORPORATION and partnership is cancelled by reason of the sale of the leasehold on the office building, then the Limited Partners shall be entitled to receive the following sums:
>
> (a) Return of balance of capital contribution; and
>
> (b) Twelve (12%) percent interest on such balance to be computed from the commencement of the current fiscal year, or the date of the most recent profit distribution, whichever period is shorter; and
>
> (c) Ratable portion of the capital gain realized upon such sale on the proportion that the original capital contribution of each bears to SEVEN HUNDRED THIRTY THOUSAND ($730,000.00) DOLLARS."

Clearly, ¶ 14 modifies only that part of ¶ 8 which provides for a pro rata distribution and that only in the event of a sale of the lease which never occurred.

If there were any discrepancies between petitioners' understanding and the written partnership agreement, petitioners had more than a decade to read this short agreement and ask for reformation. If for some reason the general partners do not have the right to return the limited partners' capital to them, then, as the court below said, "All that they have is a claim for reformation based on state law" (Petitioners' Appendix, p. 8a).

II. There Is No Conflict Between the Decision of the Court of Appeals and Any Applicable Decision of This Court

Petitioners assert that the decision of the Court of Appeals herein is in conflict with the decision of this Court in *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6 (1971). In the latter case, this Court reversed a decision of the Court of Appeals for the Second Circuit and found a claim had been stated under § 10(b). However, the basis of the decision of the Court of Appeals reversed in *Superintendent of Insurance* so differs from the basis of that Court's decision herein as to demonstrate there is no conflict between the decisions.

The decision of the Court of Appeals herein is not founded upon a narrow interpretation of the Securities Acts nor upon a theory that such acts apply only to the "garden type variety of fraud". Neither was the opinion herein based in any way upon the fact that the securities involved were not traded in the market. Rather, the Court of Appeals found that petitioners had not shown that they were damaged by a purchase or sale of securities in connection with which any deceptive device or fraud was used. Hence, petitioners lacked a federal claim for relief and the complaint was properly dismissed.

Petitioners show no damage to them from their purchase of the limited partnership interests in 1956. Rather, they have reaped large profits from these purchases. No deception or fraud in connection with the sale of these interests in 1968 could have affected them. If respondents had, under the limited partnership agreement, the right to terminate the limited partnership unilaterally and in their sole discretion, whatever information petitioners might receive could not change the fact that under the agreement they signed they had no choice but to accept the termination of their interests at the price set forth in the partnership agreement. If, on the other hand, respondents did not have the right to terminate the limited partners' interests, then the limited partners retained such interests, made no sale, and suffered no damage.

Thus, the instant case is fully in conformity with *Superintendent of Insurance v. Bankers Life & Casualty Co., supra.* The corporation which plaintiff therein represented was a seller of securities upon which a manipulative device had been used in connection with the sale and which had suffered damages through such sale as an investor. The Court of Appeals in that case had based its decision upholding the dismissal of the complaint on two erroneous conclusions: that no *investor* was injured, and that § 10(b) was limited to preserving the integrity of the securities market. Neither conclusion entered into the Court's decision in this action. Plaintiff in *Superintendent of Insurance* was injured by a sale in which deception was used. Petitioners herein were not injured by deception because the sale was pursuant to a contractual right of redemption which gave petitioners no alternative but to have their interests redeemed at a specified price.

Petitioners accuse the Court of Appeals herein of going outside the record in finding that an attorney's interpretation of ¶ "8" of the limited partnership agreement was "manifestly wrong". The agreement, however, is part of the record and it takes only a simple reading of ¶¶ 6, 8 and 14 of the agreement to allow a Court to determine the attorney had misread it. As shown at pages 12-13, *supra*, the agreement is clear that the general partners may return their capital to the limited partners at any time in their sole discretion subject only to the proviso that in the event of a sale before termination of the agreement, an event which never occurred, the limited partners shared in any capital gain.

The declaration of termination was not misleading. Respondents acted and purported to act in accord with the agreement, a document as available to petitioner as to respondents. The lease extension was irrelevant to respondents' right to repay the limited partners because under the terms of the agreement no extension of the lease extended the life of the limited partnership. There was no obligation under the contract to turn the lease to capital gain; rather, the agreement provided for exactly what happened, an extension of the lease and the repayment of the limited partners' shares.

There is no conflict between the decision of the Court below and any decision of this Court or of another panel of the Court of Appeals. No genuine question is raised as to the scope of § 10(b) or Rule 10-b-5. Rather, the decision below accords with the decisions of this Court and of the lower federal courts and no question for resolution by this Court is presented by this petition.

III. There Is No Conflict Between the Decision Appealed From and the Decision of the Court of Appeals for the Seventh Circuit

Petitioners claim that the decision of the Court below is in conflict with the decision of the Court of Appeals for the Seventh Circuit in *Allico National Corp. v. Amalgamated Meat Cutters & Butcher W.*, 397 F.2d 727 (7th Cir., 1968). However, the facts in the two proceedings and the bases for the decisions so differ that there is no inconsistency between the Courts shown by these cases.

Defendants in *Allico* had breached a contract with plaintiffs. Defendants herein did not breach a contract but acted pursuant to their written agreement with petitioners. Moreover, the Court in *Allico* did not find that a breach of contract was a sufficient basis for a claim under § 10(b) or Rule 10-b-5. Rather, it stated "that this is not solely a dispute in good faith over the existence or interpretation of contractual obligations and performance thereof." 397 F.2d 729. In the instant case whether there is a contractual obligation of respondents based upon the letter to Kaine is the sole dispute herein.

Plaintiffs in *Allico* alleged a wrongful conversion of their securities by defendant's conduct in connection with the purchase and sale of securities. Plaintiffs in *Allico* also alleged damage to them from defendant's wrong in connection with a securities transaction. Here, petitioners suffered no damage in connection with their purchase of the limited partnership interests and have shown no fraud or deceit from which they suffered injury related to their sales of such interests. The decision in *Allico* is thus clearly distinguished from the decision of the Court of Appeals herein and fully consistent therewith.

IV. The Purchaser-Seller Restriction Was Not Applied in This Proceeding

Petitioners urge that this Court rule on the purchaser-seller restriction as enunciated in *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir., 1952), cert. den. 343 U.S. 956 (1952), and other decisions. Whatever vitality such restriction may possess, this case does not present an appropriate proceeding for its consideration because the Court below in reaching its decision in no way relied on this restriction.

The decision of the Court of Appeals did not deny that petitioners had standing to sue. There is no question here that petitioners purchased limited partnership interests, but no question, either, that they suffered no damage from such purchases.

If respondents did not have the right to terminate the limited partnership in 1968, it is true that petitioners were not sellers because they retained their interests in the partnership. It is also true that they therefore sustained no damages.

In reaching its decision, the Court of Appeals assumed in petitioners' favor that the redemption of their interests was a sale. The Court found, however, that there was and could be no deception or fraud in connection with the forced sale because if the partnership agreement governed and respondents were legally entitled to terminate the partnership, it would make no difference what respondents misrepresented or concealed.

Thus, the decision of the Court below did not turn on the question whether petitioners were sellers. Rather, assuming that they were, the Court held petitioners still had no claim under the securities laws since the sale was unrelated to a claimed deception which did not harm petitioners. Petitioners, as sellers or as buyers, have not shown harm from deception in connection with the sale or purchase of securities. They have not pleaded a claim for relief under the Securities Acts for that reason, although no one denied they were purchasers and the Court assumed that they were also sellers. The "purchaser-seller doctrine" was in no way determinative of the decision of the Court below. This case does not present that issue to this Court for its determination.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM G. MULLIGAN
Counsel for Respondents HERMAN J. SCHECTMAN, SIDNEY P. SCHECTMAN, JOHN D. BUSSEL, HENRY SPELLMAN, GEORGE ZUCKERMAN individually and as General Partners of PENN ASSOCIATES, PENN ASSOCIATES, 401-8TH AVENUE CORPORATION, ROSE W. GROSS, as Executrix of the Estate of SIMEON F. GROSS and ELLIOT S. GROSS, co-partners doing business under the firm and style of "Simeon F. Gross and Elliot S. Gross" ROSE W. GROSS as sole distributee of the Estate of SIMEON F. GROSS, and ELLIOT S. GROSS.

30 West 44th Street
New York, N.Y. 10036

March, 1972

APPENDIX

APPENDIX A

Complaint

Class Action

Plaintiffs Demand Trial by Jury

UNITED STATES DISTRICT COURT
For the Southern District of New York

JACOB FERSHTMAN, HAROLD SIEGEL, ISABEL WEST, ZITA GARFIELD, LARRY SOMMA, HYMAN FREYDBERG, RENA KLEIN, JACOB KRIVILOFF, AGNES SHOEMAKER, as Executrix of the Estate of ROBERT SHOEMAKER, individually and as Limited Partners of PENN ASSOCIATES, a New York Limited Partnership.

Plaintiffs.

—against—

HERMAN J. SCHECTMAN, SIDNEY P. SCHECTMAN, JOHN D. BUSSEL, HENRY SPELLMAN, GEORGE ZUCKERMAN, individually and as General Partners of PENN ASSOCIATES, PENN ASSOCIATES, 461-8TH AVENUE CORPORATION, ROSE W. GROSS as Executrix of the Estate of Simeon F. Gross and ELLIOT S. GROSS, co-partners doing business under the firm name and style of "Simeon F. Gross and Elliot S. Gross", ROSE W. GROSS as sole distributee of the Estate of SIMEON F. GROSS, ELLIOT S. GROSS and ARTHUR YOUNG & COMPANY,

Defendants.

Plaintiffs, by their attorney, SAMUEL KALMANASH, for their complaint allege upon information and belief, except as to paragraphs "1" and "2".

Complaint

1. This Court has jurisdiction under Section 22(a) of the Securities Act of 1933 [15 U.S.C. §77v] and under Section 27 of the Securities Exchange Act of 1934 [15 U.S.C. §78aa] and the pendent jurisdiction of this Court.

2. The cause of action hereinafter alleged arises under Sections Nos. 12(2) and 17(a) of the Securities Act of 1933 as amended and Section 10(b) of the Securities Exchange Act of 1934 as amended [15 U.S.C. §78j(b) and Rule 10b-5 [17. C.F.R. 240. 10b-5] of the Securities and Exchange Commission promulgated thereunder: and Section 352-c of the General Business Laws of the State of New York.

3. All of the defendants are inhabitants of, reside in or may be found in the State of New York, and the acts and transactions giving rise to this action occurred in the State of New York and within the territorial jurisdiction of this Court.

4. *Class Action Allegation.* Plaintiffs are and at all the times hereinafter mentioned were limited partners of PENN ASSOCIATES: a New York State Limited Partnership consisting of 47 limited partners, and bring this representative class action pursuant to Rule 23(b), Fed. R. Civ. P. subd. (1) and (3) on behalf of themselves and all others similarly situated to redress the wrongful acts hereinafter complained of, which have been and are presently being committed by the defendants to the limited partners of PENN ASSOCIATES and PENN ASSOCIATES.

Plaintiffs herein will fairly and adequately protect the interest of the class in that its selection of counsel to represent the class will give the class the benefit of substantial evidence to support the cause of action herein alleged as the result of extensive depositions of the defendants and production of exhibits, numbering thousands of pages in a companion action pending in this Court "*Kaine et al v. Schectman, et al;* 68 Civil 2305. The aforesaid depositions have disclosed that the ques-

tions of law and/or fact are common to the class in which the defendants have admitted the omission of disclosure alleged herein to all members of the class and since all the defendants are inhabitants or reside in the territorial jurisdiction of this Court, it is desirable to concentrate in this forum all the litigation of the claims.

5. Plaintiffs are and at all the times hereinafter mentioned were limited partners of Penn Associates and in addition bring this as a derivative action on behalf of themselves as limited partners of Penn Associates and all others similarly situated to redress the wrongful acts hereinafter complained of which have been and are presently being committed by the defendants to the limited partners of Penn Associates and Penn Associates.

6. Defendant, PENN ASSOCIATES, is a New York Limited Partnership, organized and existing pursuant to the Partnership Laws of the State of New York, with its principal office and place of business located at 220 Fifth Avenue, in the Borough of Manhattan, City, County and State of New York.

7. The individual defendants HERMAN J. SCHECTMAN, SIDNEY P. SCHECTMAN, JOHN D. BUSSEL, HENRY SPELLMAN, GEORGE ZUCKERMAN, are and at all the times hereinafter mentioned, were the general partners of the defendant PENN ASSOCIATES (hereinafter at times collectively referred to as the "Managing Partners").

8. That at all times hereinafter mentioned, the Managing Partners were solely and completely in charge of, dominated and controlled completely the affairs and business of PENN ASSOCIATES, including the keeping of its books and records, retention of accountants and attorneys for said partnership and the preparation of statements and income tax returns showing the distributive share of income of the partners.

9. The defendant, 461-8TH AVENUE CORPORATION, (sometimes hereinafter referred to as "the Corporate

defendant") was and is a domestic corporation duly organized and existing under and by virtue of the Laws of the State of New York, with its principal office now located at 1440 Broadway, in the Borough of Manhattan, City, County and State of New York.

10. SIMEON F. GROSS and ELLIOT S. GROSS prior to and at the time of the organization of PENN ASSOCIATES and the corporate defendant and up to the death of Simeon F. Gross on or about December 31, 1963 were attorneys-at-law of the State of New York, having been duly admitted to practice the profession of law in the State of New York, and at all times herein mentioned, practiced their profession of law in the Borough of Manhattan, City and State of New York as co-partners doing business under the firm name and style of "Simeon F. Gross and Elliot S. Gross" (said partnership hereinafter referred to as "GROSS").

11. After the death of said Simeon F. Gross the defendant Elliot S. Gross continued the practice of law to and including the present time.

12. Gross and the individual defendant Elliot S. Gross at all the times hereinafter mentioned acted as attorneys for and rendered legal services to the Managing Partners of PENN ASSOCIATES, PENN ASSOCIATES and/or the defendant, 461-8TH AVENUE CORPORATION.

13. Simeon F. Gross died on December 31, 1963, a resident of the County of Kings, City and State of New York.

14. The Last Will and Testament of said Simeon F. Gross was probated in the Surrogate's Court of the State of New York, County of Kings under File No. p352/1964 and named his wife, ROSE W. GROSS, as Executrix and she having qualified as such, Letters Testamentary were duly issued by the Surrogate's Court, Kings County to said Rose W. Gross on or about January 20, 1964.

15. Simeon F. Gross by his Last Will and Testament disposed of his entire estate to his said widow, ROSE W. GROSS, and she is the distributee of all of his estate and assets.

16. That prior to the execution of the Limited Partnership Agreement of Penn Associates dated the 4th day of May, 1956 (Exhibit A), the Managing Partners, their agents, representatives, servants and/or employees solicited plaintiffs as partners and represented that said partnership was being organized to acquire from the then owners a mortgage and an unexpired leasehold of approximately 16 years expiring November 30, 1971, on the real estate premises known and designated by the street address 461 Eighth Avenue, New York, N.Y. and thereafter, own, operate, manage, control and rent said premises, receive the income therefrom and the mortgage to be acquired simultaneously by the partnership and that said partnership would continue until (1) the lease on said premises or renewals thereof was sold or (2) terminated and that (3) the investors, including plaintiffs and members of their class would share in the profits thereof in ratable proportion to their initial cash capital investment, which would constitute their percentage interest in the partnership, and that (4) the income received by them each year until their capital would be returned would be at least 12% of their capital contributions, plus their ratable proportion of excess rents shared with the owner of the fee and that the limited partners would invest approximately $400,000. cash and the Managing Partners would invest the cash sum of $330,000.

17. Said defendants Gross and Arthur Young & Company aided and abetted the Managing Partners in their misrepresentations, fraud, deceit and conspiracy hereinafter alleged and their, omission of and failure to disclose material facts in the sale of securities of PENN ASSOCIATES to the limited partners of PENN ASSOCIATES and at the request of the Managing Partners said Gross acted as officers and directors of the

defendant 461-8th AVENUE CORPORATION and held the stock of said Corporation in either of their names for the benefit and use of the Managing Partners.

18. At all the times hereinafter mentioned from the date of its incorporation in or about April 1956 until the date of the death of Simeon F. Gross on or about December 31, 1963, and for some time thereafter the defendants SIMEON F. GROSS and ELLIOT S. GROSS were in name the principal officers, directors and stockholders of the defendants 461-8TH AVENUE CORPORATION and committed the acts hereinafter alleged in violation of their professional position and responsibilities to plaintiffs as attorneys for both PENN ASSOCIATES and 461-8TH AVENUE CORPORATION.

The assumption by said Simeon F. Gross and Elliot S. Gross of the position of principal officers, directors and stockholders was for the sole purpose to conceal the true beneficial interest and identity of the Managing Partners of PENN ASSOCIATES as the controlling stockholder, officers and director principals in 461-8TH AVENUE CORPORATION, in the sale of securities of PENN ASSOCIATES to the limited partners as hereinafter alleged and to aid and abet said Managing Partners to conceal the omission and failure to disclose material facts in connection with the organization of Penn Associates and the sale of its securities to the limited partners.

19. Subsequent to the date of the death of said Simeon F. Gross without disclosure to the plaintiffs or limited partners of PENN ASSOCIATES, the Managing Partners became the principal officers of the defendant, 461-8TH AVENUE CORPORATION, and the Managing Partners constituted the Board of Directors and became the owners of all the issued and outstanding stock of 461-8TH AVENUE CORPORATION.

20. That prior to and at or about the organization and formation of PENN ASSOCIATES and up to shortly prior to

the institution of this action the defendants concealed from and failed to disclose to the plaintiffs and other limited partners that the Managing Partners, the officers, directors and stockholders of the corporate defendant were the same parties in interest and that the self-dealings between the partnership and the defendant corporation were not at arms-length.

21. That in consideration of the fees, payments and other emoluments and considerations to Gross, Elliot F. Gross and Arthur Young & Company paid by the Managing Partners, Penn Associates and the corporate defendant either directly and/or indirectly the aforesaid joined in, aided and abetted the conspiracy and fraud practiced by the Managing Partners upon the plaintiffs and members of their class as herein stated upon the organization and formation of PENN ASSOCIATES by lending themselves to conceal the identity and interests of the Managing Partners in the transactions herein set forth and thereby aided and abetted the fraudulent scheme and conspiracy to benefit said Managing Partners who were in fact the stockholders, owners and in control of the corporate defendant and caused false and improper statements and income tax returns to be prepared and distributed showing distribution of income to the limited partners knowing they would rely thereon.

22. Beginning in April 1956 and continuing thereafter to the present time all of the defendants engaged in a continuing agreement, understanding, concert of action, plan, scheme and conspiracy to, and did in fact, unlawfully, wilfully and knowingly, directly and indirectly, in the sale of securities of PENN ASSOCIATES to the plaintiffs and other limited partners of PENN ASSOCIATES, which securities consisted of $400,000. of limited partnership interests in PENN ASSOCIATES, by the use and means and instruments of transportation and communication in interstate commerce and by the use of the mails, (a) employ devices, schemes and

artifices to defraud; (b) obtain money by means of untrue statements of material facts and/or omissions to state material facts necessary in order to make the statements made in the light of the circumstances under which they were made not misleading; and (c) engage in acts, practice or course of business which operates or would operate as a fraud or deceit upon the plaintiffs and members of their class as herein alleged.

23. The acts and omissions of the defendants as herein alleged were part of a continuing agreement, understanding, concert of action, plan, fraudulent scheme and conspiracy among the Managing Partners, aided and abetted by their co-defendants, to represent and induce, and did in fact induce the plaintiffs and members of their class to furnish their equity cash capital contributions to PENN ASSOCIATES which would be used by PENN ASSOCIATES together with the equity cash capital contribution of the sum of $330,000, by the Managing Partners for the purchase of the aforesaid lease in the unexpired term of approximately 16 years and mortgage on premises 461-8TH AVENUE from its then owners thereof as the purpose in the formation of PENN ASSOCIATES and thereafter defraud the limited partners as herein alleged.

24. As part of said continuing agreement, understanding, concert of action, plan, scheme and conspiracy to induce the plaintiffs and members of their class to purchase equity securities of PENN ASSOCIATES, and knowing that the plaintiffs and members of their class intended to rely upon the representations made, as complete, truthful and not misleading, the Managing Partners made or caused to be made untrue, statements of material facts as follows:

(a) That the partnership PENN ASSOCIATES was being organized to acquire an unexpired lease of approximately 16 years to November 31, 1971 and a mortgage on premises 461-8TH AVENUE, in the Borough of Manhattan, City and State of New York from the then owners thereof.

(b) That the limited partners were to invest the sum of $400,000. cash equity capital and the Managing Partners were going to invest the sum of $330,000. cash equity capital.

(c) That the partnership would continue until the lease or any renewals thereof terminated or would be sold in which event all partners would share in capital gain in ratable proportion to their cash equity capital contribution.

(d) That until the partners capital contributions were repaid from payments received in amortization or reduction of the mortgage the limited partners would receive out of first profits at least 12% of their cash equity capital contribution.

25. As a fruther part of said continuing agreement, understanding, concert of action, plan, scheme and conspiracy to induce the plaintiffs and members of their class to purchase equity securities of PENN ASSOCIATES, the Managing Partners omitted to state, and failed to disclose, which omission and failure to disclose have been aided and abetted by their conspirator defendants up to the discovery thereof, as follows:

(a) At the time plaintiffs and members of their class were being solicited as limited partners of Penn Associates, said Managing Partners had in fact entered into a contract through the media of the corporate defendant: 461-8TH AVENUE CORPORATION to acquire said lease and mortgage.

(b) That the agreement to purchase the lease and mortgage by the defendant 461-8th Avenue Corporation was upon more favorable terms than 461-8TH AVENUE CORPORATION was making with Penn Associates.

(c) That in acquiring the lease and mortgage, Penn Associates instead of dealing with the then owners of said lease and mortgage, would instead be purchasing said lease and mortgage from the Managing Partners through the guise of their wholly owned and controlled corporate defendant the 461-8TH AVENUE CORPORATION.

(d) That Simeon F. Gross was the President of the 461 8TH AVENUE CORPORATION.

(e) That Simeon F. Gross was the attorney for the Managing Partners and was also acting as attorney for Penn Associates.

(f) That Simeon F. Gross who held all the stock of 461 8th Avenue Corporation held same for the beneficial owners, the Managing Partners.

(g) That in purchasing said lease and mortgage from the 461 8th Avenue Corporation, Penn Associates was entering into an operating agreement with the 461 8th Avenue Corporation, the alter ego of the Managing Partners, whereby the Managing Partners through said corporate defendant would receive a share of the profits in the operation of the leasehold and ownership of the mortgage without any investment of cash equity capital.

(h) That the defendant 461 8th Avenue Corporation which in effect was the Managing Partners alter ego had made a more advantageous agreement for the purchase of the lease and mortgage than it was giving to Penn Associates in that the amount of excess rental from the premises 461 8th Avenue which it shared with the owner of the fee was a lesser amount than which Penn Associates would receive as its share and the percentage retained by the corporate defendant would be a greater percentage than Penn Associates would receive.

(i) That the Managing Partners did not intend to invest the sum of $330,000 cash equity capital but had arranged with the Irving Trust Company that it would first obtain the Limited Partners cash equity capital contributions in the sum of approximately $400,000 which they would deposit with the Irving Trust Company, which would then make a loan of $300,000 to Penn Associates on the pledged collateral security of the lease and mortgage to be acquired by Penn

Associates; said Managing Partners thereby made a cash equity capital investment of $30,000. which is their ratable proportionate investment in Penn Associates rather than $330,000. as agreed.

(j) The tax advantages of the operation of the leasehold such as amortization of the leasehold acquisition and depreciation of improvements were to be and were siphoned off to 461-8TH AVENUE CORPORATION for the sole benefit of the Managing Partners.

(k) That extensions of leases would be sought through the medium of 461 8TH AVENUE CORPORATION and were in fact obtained in 1962 and 1963 and as of January 1, 1968 for a twenty year period expiring December 31, 1988.

26. That upon the organization and formation of PENN ASSOCIATES, the Managing Partners to aid the fraudulent scheme and conspiracy to benefit themselves as beneficial stockholder, officers and directors of the corporate defendant, 461-8TH AVENUE CORPORATION, fraudulently and falsely misrepresented and deceived and misled the plaintiffs and their class of limited partners that the partnership would only terminate upon the sale of the leasehold of the office building 461-8TH AVENUE, in the Borough of Manhattan, City, County and State of New York, or such other events which would terminate the partnership and cause distribution of the assets to all partners.

27. That at the time said representations and inducements were made, they were false and fraudulent and were known to the defendants to be false and fraudulent and were made only with the intent of inducing the plaintiffs and members of their class of limited partners to contribute their capital for the Managing Partners purposes and needs and for the intent of cheating and defrauding the plaintiffs and members of their class by inducing them to sign an improper, unclear and

ambiguous instrument (Exhibit "A") which did not properly set forth the aforesaid agreement on the ground that expediency required its immediate signature. Plaintiffs believing said representations to be true, and not being aware of the defendants failure to disclose material facts, did justifiably rely upon said false and fraudulent representations that said partnership would continue until said leasehold was sold or terminate for all and plaintiffs and members of their class would continue to receive their ratable percentage of the partnership profits capital gain in the event of sale of the leasehold and tax advantages as aforesaid.

28. That prior to the expiration of the leasehold (November 30, 1971) and/or sale of said leasehold on premises 461-8th Avenue and prior to the attempted termination of the partnership hereafter alleged, the defendants secretly and without disclosing said facts to the plaintiffs and other limited partners of PENN ASSOCIATES and in violation of their fiduciary obligation and position of trust to the partnership and the limited partners thereof, and after expending large amounts of partnership funds in making capital improvements to the leasehold, in the name of and ostensibly in behalf of the corporate defendant secretly renegotiated and obtained extensions of leases from the fee owners of premises 461 Eighth Avenue, in 1962 and 1965 and as of January 1, 1968 for a further term expiring December 31, 1988, which except for some incidental changes was upon the same terms and conditions as the prior lease, which said renewal in the light of the unilateral attempted termination of the limited partners interests shortly thereafter was a gross and deliberate fraud and a flagrant and callous breach of trust owed to PENN ASSOCIATES and to the limited partners of PENN ASSOCIATES.

29. That by notice dated March 29, 1968, the Managing Partners of PENN ASSOCIATES, although the leasehold on

461-8th Avenue had not been sold, unilaterally illegally, arbitrarily and fraudulently notified the limited partners that their interest in the partnership was being terminated.

30. At the time the limited partners were notified as aforesaid, the defendants failed to inform or disclose to the plaintiffs and members of their class that the Managing Partners through the media of their alter ego, the 461-8TH AVENUE CORPORATION, had in 1962 and 1965 and again as of January 4, 1968, during the term of the lease for which PENN ASSOCIATES had been organized and while said lease was still in full force and effect, made extensions of said lease for a twenty (20) year period expiring December 31, 1988.

31. That the defendants had conspired since the sale of the equity securities in Penn Associates at the inception to acquire for the Managing Partners the assets of the partnership and without disclosure to the limited partners of said conspiracy. That in furtherance of such conspiracy and as an overt act thereof, the corporate defendant, 461-8TH AVENUE CORPORATION at the behest of the Managing Partners and for their benefit and financial gain to the detriment of the plaintiffs and members of their class solicited and obtained prior to and as of the 1st day of January, 1968 renewals and extensions of the lease covering premises 461 Eighth Avenue, New York, New York, for the term ending December 31, 1988 as aforesaid.

32. That the defendants and particularly the Managing Partners in sole and complete control of PENN ASSOCIATES' operations and in violation of their position of trust to the plaintiffs and their class of limited partners fraudulently conspired and failed to disclose to plaintiffs and members of their class the appropriation of the assets of the partnership whose beneficial ownership in the event of a sale, or income would be ratably payable to the limited partners, all in violation of their position of trust and in violation of their fiduciary obligations to the plaintiffs as a class.

33. That in negotiating with the owner of premises 461-8th Avenue, New York, said Managing Partners arranged and negotiated for themselves as the beneficial stockholders of the corporate defendant extensions of the lease in 1962 and 1965 and 1968 on said 461-8th Avenue and failed to disclose their acts all of which they should be held to have done in their capacities as trustees for the limited partners as *cestui que trustant*.

34. The alleged termination of the partnership is illegal, unlawful and in violation of the Partnership Laws of the State of New York and said purported termination of the partnership should be declared null and void and the partnership declared in full force and effect and the Managing Partners and the corporate defendant held to be constructive trustees of all the assets, rents, income and profits made and the extension of the lease heretofore referred to as a result of their illegal and unlawful failure to disclose the aforesaid and a receiver be appointed of the assets, lease and its extension for the benefit of the plaintiffs and members of their class and the defendants barred from all interest in the aforesaid.

35. That as a result of the fraud, deceit and conspiracy practiced by the defendants upon the limited partners aforesaid the profits and income of said defendants should be declared the profits and income of the partnership and distributed to all of the partners ratably in proportion to their initial percentage contribution to the partnership.

36. That although heretofore duly demanded, the defendants and each of them, failed and refused and still fail and refuse to account fully and to pay over to the plaintiffs and members of their class the profits of the partnership and the profits that the individual defendants have diverted to themselves in violation of their fiduciary obligation to the plaintiffs and members of their class from whom the defendants have diverted the profits by the guise of the interjection of the corporate defendant and otherwise.

37. That the defendants be held liable in the sum of $2,000,000. as punitive damages for the intentional wrongs practiced on the limited partners as herein alleged besides such other relief as herein set forth.

WHEREFORE, plaintiffs pray for final judgment:

I. Declaring 461-8th AVENUE CORPORATION, PENN ASSOCIATES and the defendants, HERMAN J. SCHECTMAN, SIDNEY P. SCHECTMAN, JOHN D. BUSSEL, HENRY SPELLMAN and GEORGE ZUCKERMAN, individually and as General Partners of PENN ASSOCIATES and 100% stockholders of 461-8th AVENUE CORPORATION, as constructive trustees for the benefit of PENN ASSOCIATES and the plaintiffs and members of their class as limited partners of the ownership of the leasehold on 461-8th Avenue in the Borough of Manhattan, City and State of New York and any and all extensions and renewals thereof.

II. Requiring defendants to account to Penn Associates as to the transaction and tax advantages between PENN ASSOCIATES and 461-8TH AVENUE CORPORATION and the assets and moneys received and had in the joint accounts between PENN ASSOCIATES and 461-8TH AVENUE CORPORATION and the defendants and each of them be decreed to pay over to PENN ASSOCIATES for distribution to plaintiffs and members of their class of the sums ascertained to be due them.

III. Decreeing the interests of the plaintiffs and members of their class and the Managing Partners in accordance to their cash equity capital contributions to PENN ASSOCIATES.

IV. Requiring defendants to account to PENN ASSOCIATES and the limited partners of PENN ASSOCIATES, for compensatory and punitive damages due them in the sum of $2,000,000. for their wilful and intentional acts to defraud plaintiffs and members of their class.

V. Awarding to plaintiffs the costs and disbursements of this action, together with reasonable attorney's fees in an amount to be approved by this Court and ordering and requiring payment of the same from the account of PENN ASSOCIATES, or in such other manner or from such other source or sources as may be determined by this Court; and

VI. Awarding to plaintiffs and/or to or for the benefit of the limited partners of PENN ASSOCIATES, such other, further and different relief as to the Court may seem just, equitable and proper in the premises, including all disbursements and expenses of this action and provisions for plaintiffs' attorneys' and accountants' fees and costs.

Dated: New York, New York
June 2, 1970.

/s/ Samuel Kalmanash
SAMUEL KALMANASH, ESQ.
Attorney for Plaintiffs
Office & P.O. Address
292 Madison Avenue
New York, New York 10017
Telephone No. 212-889-8288

APPENDIX B

Limited Partnership Agreement

LIMITED PARTNERSHIP AGREEMENT dated the 4th day of May, 1956, among HERMAN J. SCHECTMAN, residing at No. 360 Cabrini Boulevard, New York, N. Y., SIDNEY P. SCHECTMAN, residing at No. 25 Oaks Hunt Road, Lake Success, Long Island, N. Y., GEORGE ZUCKERMAN, residing at 6801 - 21st Avenue, Brooklyn, N. Y., HENRY SPELLMAN, residing at No. 250 West 94th Street, New York, N. Y., and JOHN D. BUSSEL, residing at No. 45 East 82nd Street, New York, N. Y., as GENERAL PARTNERS, and ABRAHAM WEZEKEWITZ, in trust for Sheba Wezekewitz, residing at 778 East 3rd Street, Brooklyn, N. Y., JOSEPH LOMBARDO, in trust for Angela Lombardo, residing at 215 President Street, Brooklyn, N. Y., WILLIAM L. GOLDBERG, in trust for Sadie Goldberg, residing at 1615 Avenue I, Brooklyn, N. Y., SIDNEY J. WHITE, residing at 6510 N. 11th Street, Oak Lane, Philadelphia, Pennsylvania, IRENE STEINBERG, residing at 74-12 35th Avenue, Jackson Heights, Long Island, N. Y., GEORGE SCOVNER, residing at 6701 - 19th Avenue, Brooklyn, N. Y., EDWARD SCOVNER, residing at 6701 - 19th Avenue, Brooklyn, N. Y., FRIEDA MADRESH, residing at 764 Arnow Avenue, Bronx, N. Y., ROSE LANDAU, residing at 35-53 82nd Street, Jackson Heights, Long Island, N. Y., BERTHA SCHNIPPER, residing at 64 Linden Avenue, Springfield, New Jersey, SONIA H. STIRT, residing at 7 West 96th Street, New York, N. Y., SOL BLOOMBERG, residing at 825 East 9th Street, Brooklyn, N. Y., JACK PLUDO, residing at 1680 Ocean Avenue, Brooklyn, N. Y., ANNE YOUNG, residing at 55 East 86th Street, New York, N. Y., LEON RUDORFER, residing at 377 Montgomery Street, Brooklyn, N. Y., HENRY KISLAK, residing at 533 Green Place, Woodmere, Long Island, N. Y., GEORGE B. JERZY GLASS, in trust for Janet Catherine Glass, residing at 60 Sutton Place South, New York, N. Y., LILLIAN WEINGARTEN, residing at 685 West End Avenue, New York, N. Y., JOHN D. BUSSEL, in trust for James Bruce Bussel, residing at 45 East 82nd Street, New York, N. Y., ROBERTA SPELLMAN, residing at 250 West 94th Street, New

York, N. Y., CLARA ZUCKERMAN, residing at 6801 21st Avenue, Brooklyn, N. Y., JACOB KRIVHOFF, residing at 182 Bennett Avenue, New York, N. Y., ALBERT KAINE, residing at 300 Hayward Avenue, Mount Vernon, N. Y., ISABEL WEST, residing at 82 Mulchester Avenue, White Plains, N. Y., ROBERT SHOEMAKER, residing at 61 DeKalb Avenue, White Plains, N. Y., ALFRED B. SOMMA, residing at 76 No. Main Street, Brewster, N. Y., HYMAN FREYDBERG, residing at 2322 Grand Avenue, Bronx, N. Y., LARRY SOMMA, residing at 71 Leyton Place, White Plains, N. Y., REUBEN LIPTON, residing at 12 Princeton Avenue, Yonkers, N. Y., WILLIAM KOLINS, residing at 300 Hayward Avenue, Mount Vernon, N. Y., JACOB FERSHTMAN, residing at 67 Crotty Avenue, Yonkers, N. Y., HARRY S. FRIEDLANDER, residing at 1695 Grand Concourse, Bronx, N. Y., A. RICHARD GREENE, residing at 62 Bryant Avenue, White Plains, N. Y., IRVING CHESTNEY, residing at 66-56 Saunders Street, Forest Hills, L. I., N. Y., LEON PENTEL, residing at 25 Central Park West, New York, N. Y., LEO BROWN, residing at 31 Old Farm Road, Lake Success, L. I., N. Y., THELMA ROSENBERG, residing at 2082 Bryant Avenue, Bronx, N. Y., EVE ROSENBERG, residing at 219 West 81st Street, New York, N. Y., JESSE SCHECTMAN, residing at 34-21 78th Street, Jackson Heights, Long Island, N. Y., IRVING HANAN, residing at 2845 University Avenue, Bronx, N. Y., ABE KLEIN, residing at 88 Grandview Boulevard, Yonkers, N. Y., SELMA SEIFFERT, residing at 88 Avon Avenue, Forest Hills, N. Y., HAROLD SIEGEL, residing at 182 Crosthill Road, Yonkers, N. Y., DAVID BRUNELL, residing at 84 Cooper Drive, New Rochelle, N. Y., ROBERT LISOWORN, of 1430 Broadway, New York, N. Y., CELIA GREENBERG, residing at 985 Northfield Road, Woodmere, L. I., N. Y., and R. ROY GREENBERG, residing at 985 Northfield Road, Woodmere, L. I., N. Y., as LIMITED PARTNERS,

WHEREIN IT IS MUTUALLY AGREED AS FOLLOWS:

1. The name of the Limited Partnership is "PENN ASSOCIATES".

2. The character of the partnership's business is the operation, management and control of premises No. 461 Eighth Avenue, New York City, hereinafter called the "office building", and the ownership of the second mortgage on the fee of said premises herein called "the mortgage", in accordance with the provisions of an agreement between 461-8th AVENUE CORPORATION and "PENN-ASSOCIATES", dated the 4th day of May, 1956, a copy of which agreement is attached hereto and made a part hereof.

3. The principal place of business of the partnership is at No. 220 Fifth Avenue, Borough of Manhattan, County of New York, City and State of New York.

4. The name of each General Partner, and the investment made by each, is as follows:

General Partner	Contribution
Herman J. Schustman	$82,500.00
Sidney P. Schustman	82,500.00
John D. Russel	35,000.00
Henry Spellman	35,000.00
George Zuckerman	35,000.00

5. The name of each Limited Partner, and the contribution made by each, is as follows:

Limited Partner	Contribution
Abraham Wezekowitz, in trust for Sheba Wezekowitz	$25,002.50
Joseph Lombardo, in trust for Angela Lombardo	10,001.00
William L. Goldberg, in trust for Sadie Goldberg	10,001.00
Sidney J. White	10,001.00
Irene Steinberg	10,001.00
George Sweeney	10,001.00

Limited Partner	Contribution
Edward Seaver	10,001.00
Frieda Madresh	10,001.00
Rose Laidau	10,001.00
Bertha Schniper	10,001.00
Sonia H. Stirt	10,001.00
Sol Bloomberg	10,001.00
Jack Pludo	10,001.00
Anne Young	26,002.60
Aaron Rudorfer	10,001.00
Henry Kislak	10,001.00
George B. Jerzy Glass, in trust	
for Janet Catherine Glass	10,001.00
Lillian Weingarten	10,001.00
John D. Bussel, in trust for	
James Bruce Bussel	5,000.50
Roberta Spellman	5,000.50
Clara Zuckerman	5,000.50
Jacob Kriviloff	5,000.50
Albert Kaine	5,000.50
Isabel West	5,000.50
Robert Shoemaker	5,000.50
Alfred W. Somma	5,000.50
Hyman Freydberg	5,000.50
Larry Somma	5,000.50
Reuben Lipton	5,000.50
William Kolins	5,000.50
Jacob Fershtman	5,000.50
Harry S. Friedlander	10,001.00
A. Richard Greene	10,001.00
Irving Chestney	5,000.50
Leon Pentel	15,001.50
Leo Brown	5,000.50
Thelma Rosenberg	8,000.80
Ace Rosenberg	10,001.00
Jesse Schectman	10,001.00

Limited Partner	Contribution
Irving Hanan	20,002.00
Abe Klein	5,000.50
Selma Seiffert	5,000.50
Harold Siegel	5,000.50
David Brunell	2,000.20
Robert Leon Horn	5,000.50
Celia Greenberg	12,501.25
R. Roy Greenberg	2,500.25

6. The partnership shall commence on the date of filing the Certificate of Limited Partnership in the Office of the County Clerk of New York County. The partnership shall terminate on the 30th day of November, 1971, unless sooner terminated by either:

(a) a sale of the leasehold on the office building; or

(b) repayment of the contributions of the Limited Partners in full, as is more particularly hereinafter set forth; or

(c) retirement, death or insanity of a General Partner.

7. None of the Limited Partners has agreed to make any additional contribution to the capital of the partnership.

8. The contributions of the Limited Partners to the capital of the partnership may be returned to them in whole, or in part, at any time, in the sole discretion of the General Partners, provided that all repayments of capital shall be pro rata among all the Limited Partners, subject to the provisions of paragraph 14.

9. Subject to the provisions of Section 104 and 105 of the Partnership Law, the minimum required repayments of the capital contributions of the Limited Partners shall be as follows:

(a) Four (4%) percent of the original capital contribution of the Limited Partners for each of the first five (5) years from the date hereof;

(c) the term "other expenses" shall be deemed to include all expenses of whatsoever kind or nature other than those referred to in (a) and (b) hereof actually and reasonably incurred in connection with the operation of the business of the partnership, including, without limitation, organization expenses, filing fees, legal fees, accounting fees, and moneys paid or payable in connection with claims against the partnership.

11. The net profits of the partnership shall be divided ratably among the Limited Partners in accordance with the contribution of each, as hereinabove set forth, at the rate of twelve (12%) percent per annum on the then outstanding balance of the capital contribution of each Limited Partner. Any profits remaining after such distribution of twelve (12%) percent annually, shall belong solely to the General Partners, to be divided among them in proportion to the capital contributions made by them, subject to the following single limitation:

In addition to the twelve (12%) percent distribution, as hereinabove provided, the Limited Partners shall share with the General Partners in the twenty-five (25%) percent of the amount of rent actually collected from premises No. 461 Eighth Avenue, New York City, in excess of EIGHT HUNDRED FIFTEEN THOUSAND ($815,000.00) DOLLARS, for any year that this agreement is in effect. Such additional distribution shall be apportioned in accordance with the original capital contribution of each General and Limited Partner, and payment made on or before September 30, 1956 and quarterly thereafter until the expiration of this agreement.

12. Losses suffered or incurred by the partnership shall be borne by the General and Limited Partners in proportion to their respective original capital contribution in the partnership, provided that no Limited Partner shall bear any loss in excess of his original capital contribution increased by the amount of distributions made to such Limited Partner, pursuant to the provisions of paragraph 9 of this agreement. All losses incurred

by the partnership in excess of the original contribution to the capital of the partnership, and the total distributions of the partnership shall be borne by the General Partners in proportion to their capital contribution.

13. The General Partners shall have the right at any time to modify the agreement dated the 4th day of May, 1956 between the partnership and 461-8th AVENUE CORPORATION so as to

(a) increase the basic monthly rent payable to the landlord of the office building for all or any part of the unexpired period of the present lease, and such modification shall be binding upon the partnership; and

(b) to renew or extend the lease on the office building so that said lease shall continue in effect, or be renewed past November 30, 1971, the present termination date. Such renewal or extension shall not extend the life of the limited partnership past the time set for termination in paragraph 6 herein.

In the event of any modification in the amount of basic monthly rent payable to 461-8th AVENUE CORPORATION, then the General Partners agree that if subsequent distributions of net profits to Limited Partners, pursuant to the provisions of paragraph 11 shall not reach twelve (12%) percent for any year that this agreement remains in effect, the General Partners shall in proportion to their capital contribution, personally contribute to the increase of the distribution of each Limited Partner so that each of the Limited Partners shall receive twelve (12%) percent per annum on the remaining balance of his capital contribution.

14. In the event that the agreement dated the 4th day of May, 1956 between 461-8th AVENUE CORPORATION and partnership is cancelled by reason of the sale of the leasehold on the office building, then the Limited Partners shall be entitled to receive the following sums:

(a) Return of balance of capital contribution; and

(b) Twelve (12%) percent interest on such balance to be computed from the commencement of the current fiscal year, or the date of the most recent profit distribution, whichever period is shorter; and

(c) Ratable portion of the capital gain realized upon such sale, on the proportion that the original capital contribution of each bears to SEVEN HUNDRED THIRTY THOUSAND ($730,000.00) DOLLARS.

15. The General Partners shall have the absolute right to assign, pledge, mortgage or hypothecate any of the assets of the partnership, whether for the purpose of the partnership, or for their own capital contributions, but not for more than a loan of THREE HUNDRED THOUSAND ($300,000.00) DOLLARS or any extension or renewal thereof, provided the proceeds of such loan or loans are used for the purposes of the partnership or towards the contribution of the capital of the General Partners.

16. None of the Limited Partners shall have the right to substitute an assignee as contributor in his place, except that the interest of a Limited Partner may be assigned, provided the prior written consent of the General Partners to any such assignment shall first be obtained. With the prior written consent of the General Partners (not to be unreasonably withheld), an assignee of a Limited Partner may be admitted as a Limited Partner in the place and stead of the assigning Limited Partner, upon condition that any such assignee so to be admitted shall execute and acknowledge such instruments, in form and substance reasonably satisfatory to the General Partners which they may deem necessary or desirable to effectuate such admission and to confirm the agreement of the person being admitted as such Limited Partner to be bound by all the covenants, terms and conditions of the partnership agreement as the same may have been amended; such assignee so to be admitted shall also pay all reasonable expenses in connection with such admission as a Limited Partner, including,

but not limited to, the cost of the preparation, filing and publishing of any amendment of the Certificate of Limited Partnership which the General Partners may deem necessary or desirable in connection with the admission of such assignee as a Limited Partner.

17. The partners shall not have the right to admit additional Limited Partners except that, with the prior written consent of the General Partners (not to be unreasonably withheld), an assignee of a Limited Partner, or executor, administrator, trustee, legatee or distributee of a deceased Limited Partner may be admitted as a Limited Partner in the place and stead of the assigning Limited Partner or deceased Limited Partner, as the case may be, upon the same terms and conditions, as hereinabove provided, in paragraph 16.

18. None of the partners, General or Limited, shall have the right to demand or receive property other than in cash in return for their contributions to the capital of the partnership.

19. The partnership books shall be kept at the principal place of business of the partnership, and the Limited or General Partners shall have the right at all reasonable times to inspect and copy any of them. The General Partners shall also deliver to each Limited Partner quarterly, a statement of income, and also the Information Returns showing the Income of each Limited Partner, prior to the filing thereof with the Federal and State Governments. The General Partners further agree to furnish each Limited Partner with a final detailed statement upon the termination of the partnership.

20. The General Partners agree to render necessary services in connection with the business of the partnership, and to devote as much time thereto as may be necessary, it being agreed, however, that they may engage in other businesses, including real estate activities, and may, if they deem it advisable, employ a managing agent to have charge of the operation of the office building. They agree to furnish, from the

date of this agreement, office facilities, including telephone, stationery, secretarial and like facilities, for the expense of which they shall be entitled to receive reasonable reimbursement. No salary, bonus, fee, compensation or remuneration for services to the partnership shall be paid to any General Partner.

The General Partners shall have complete control of the business of the partnership. In the event of any dispute or difference of opinion as to the policies of the partnership or as to the management of its business or (except with respect to the Limited Partners) concerning the interpretation of this agreement, or the rights of the parties, the final decision shall be made by a majority in interest of the General Partners, and each party hereto agrees to abide by any such decision. The phrase "a majority in interest of the General Partners", as used above, shall mean and refer to any three or more General Partners the aggregate of whose capital contributions exceeds fifty-one (51%) percent of the capital contributions made by the General Partners.

21. Unless otherwise specified in writing, the address of each party hereto shall be that set forth following his name above.

22. This agreement may be executed in counterparts, all of which taken together shall be deemed one original. Each partner agrees that one original of this agreement (or set of original counterparts) shall be held at the office of the partnership and that there shall be distributed to each partner a conformed copy thereof.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals as of the date hereinabove set forth.

AS GENERAL PARTNERS

/s/ HERMAN I. SCHECTMAN (L.S.)

/s/ SIDNEY P. SCHECTMAN (L.S.)

/s/ HENRY SPELLMAN (L.S.)

/s/ GEORGE ZUCKERMAN (L.S.)

/s/ JOHN D. BUSSEL (L.S.)

AGREEMENT made this 4th day of May, 1956, between 461-8th AVENUE CORPORATION, a domestic corporation, having its principal office in Suite 600, No. 277 Broadway, Borough of Manhattan, City, County and State of New York (hereinafter referred to as "CORPORATION"); and PENN ASSOCIATES, a limited partnership having its office at No. 220 Fifth Avenue, in the Borough of Manhattan, City, County and State of New York (hereinafter referred to as "PENN").

WITNESSETH:

WHEREAS, CORPORATION has contracted to purchase the leasehold on premises known as No. 461-8th Avenue, in the Borough of Manhattan, City, County and State of New York, for a consideration of TWO HUNDRED EIGHTY-SIX THOUSAND TWO HUNDRED FIFTY ($286,250.00) DOLLARS; and

WHEREAS, CORPORATION has contracted to purchase for the sum of THREE HUNDRED NINETY-THREE THOUSAND SEVEN HUNDRED FIFTY ($393,750.00) DOLLARS the second mortgage on the fee of the same premises, which mortgage was originally in the sum of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS but reduced to the sum of THREE HUNDRED NINETY-THREE THOUSAND SEVEN HUNDRED FIFTY ($393,750.00) DOLLARS; with interest at the rate of two (2%) percent per annum from the 1st day of March, 1956, payable quarter-annually, together with the quarter-annual installments of SIX THOUSAND TWO HUNDRED FIFTY ($6,250.00) DOLLARS in reduction of the said mortgage, until said mortgage is fully paid; and

WHEREAS, CORPORATION requires additional sums of money for the payment of tax deposits and prepaid rent at the time of closing; and

WHEREAS, CORPORATION has informed PENN that it does not have sufficient moneys to consummate said transactions and has requested PENN to advance such moneys, upon the terms and conditions hereinafter set forth; and

WHEREAS, PENN has agreed to furnish the moneys required by CORPORATION for the consummation of such transactions, upon the terms and conditions hereinafter set forth;

NOW, THEREFORE, IT IS MUTUALLY AGREED AS FOLLOWS:

1. *Loan.* PENN agrees to loan to CORPORATION the sum of SEVEN HUNDRED THIRTY THOUSAND ($730,000.00) DOLLARS to be used by CORPORATION for the following purposes:

A. The sum of TWO HUNDRED EIGHTY-SIX THOUSAND TWO HUNDRED FIFTY ($286,250.00) DOLLARS to be applied to the purchase price of the leasehold on premises No. 461 Eighth Avenue, in the Borough of Manhattan, City, County and State of New York, from HERMAN HAIMES, BENJAMIN KAUFMAN and MORRIS A. MARKS, as sellers, in accordance with the terms of a contract dated April 11, 1956, a copy of which has been exhibited to PENN.

B. The sum of THREE HUNDRED NINETY-THREE THOUSAND SEVEN HUNDRED FIFTY ($393,750.00) DOLLARS to be applied to the purchase price of the second mortgage, as reduced, covering the fee of the premises in accordance with the provisions of the contract, hereinabove mentioned.

C. The sum of FIFTY THOUSAND ($50,000.00) DOLLARS to be applied to the adjustments of the transaction, including reimbursement to the sellers for the assignment of the tax reserve held by the owner of the fee, pursuant to the terms of the lease; the payment of the base rent for the month

beginning May 1, 1956, prepaid insurance premiums, and such other adjustments as may be necessary pursuant to the terms of the contract of purchase and sale.

2. *Security for Loan.* CORPORATION does hereby agree to assign to PENN, by a duly executed assignment of mortgage, the second mortgage on the fee of premises No. 461-8th Avenue, New York City, originally in the sum of FIVE HUNDRED THOUSAND ($500.000.00) DOLLARS, and reduced by payments, to THREE HUNDRED NINETY-THREE THOUSAND SEVEN HUNDRED FIFTY ($393,750.00) DOLLARS as soon as such mortgage is assigned to CORPORATION. Such mortgage is to be reassigned by PENN to CORPORATION by a duly executed assignment of mortgage as soon as the balance of the loan of SEVEN HUNDRED THIRTY THOUSAND ($730,000.00) DOLLARS is repaid by CORPORATION to PENN.

PENN agrees to take such assignment subject to the provisions of said mortgage, and further agrees to execute any consents that may be necessary, and in all respects to comply with the covenants and conditions on the part of the mortgagee to be performed. During the time the loan is not fully repaid, PENN is hereby given the right to assign, hypothecate or pledge this mortgage for any loan obtained by PENN.

3. *Employment and Term.* CORPORATION does hereby grant to PENN the exclusive right to operate, control, manage and supervise the leasehold on 461 Eighth Avenue, in the Borough of Manhattan, City, County and State of New York, from the date of the assignment of the leasehold to CORPORATION until the expiration of the major lease, or until such earlier time that PENN shall give to CORPORATION thirty (30) days' written notice, by certified mail, that it desires to cancel this agreement and terminate its liability as of the last day of the month following the date of mailing of such notice.

Limited Partnership Agreement

4. *Share of the Profits.* During the term of this agreement, PENN shall pay to CORPORATION five (5%) percent of the net profits of the operation of the leasehold, as follows:

(a) Definition of "net profits". Net profits as used herein shall mean the "net earnings" of PENN for each fiscal year ending April 30th, beginning with the fiscal year commencing May 1, 1956, as determined by the auditor regularly employed by PENN; such computation to be made in accordance with sound accounting practice. Without limiting the generality of the foregoing, the following shall be observed:

(1) The amount deducted for taxes shall include all taxes, except income tax.

(2) Proper deductions shall be made for the return of the loan of PENN, at the following rates:

(i) Four (4%) percent per annum for each of the first five (5) years;

(ii) Six (6%) percent per annum for each of the following four (4) years;

(iii) Eight (8%) percent per annum for the following six (6) years; and

(iv) Eight (8%) percent [illegible] the expiration of this agreement.

(3) A deduction shall be allowed for collection of rents, provided such expense shall be no greater than customary rates set by the Manhattan Real Estate Board then in effect.

(b) Determination of net profits. The net profits shall be determined by the auditor within fifteen (15) days after the close of each fiscal year, and a written statement of such determination shall be submitted by the auditor to CORPORATION within five (5) days of each such determination. The auditor's statement shall be conclusive on the parties hereto.

(c) Payment of net profits. Within ten (10) days after the determination of net profits for each fiscal year, PENN shall pay to CORPORATION an amount equal to five (5%) percent of such net profits with credit for any interim payments made by PENN to CORPORATION during such fiscal year.

5. *Renewal.* In the event CORPORATION shall renew its lease for any period beyond its present expiration, then PENN shall have the option of extending this agreement for the renewal period of the lease, provided PENN shall pay to CORPORATION an amount equal to the consideration paid by CORPORATION to the landlord, together with expenses of such renewal and its attorney's fees, regardless of whether the limited partnership is dissolved, and "PENN ASSOCIATES" is then a partnership.

6. *Payments of Rents and Taxes.* PENN agrees to pay to CORPORATION on or before the last day of the month the base rent called for under the terms of the lease, for the following month, as well as a sum equal to one-twelfth of the annual taxes on or against premises No. 461 Eighth Avenue, New York City (as estimated by the landlord). PENN also agrees to pay to CORPORATION on or before June 10, 1956 and on the 10th day of each quarter thereafter, a sum equal to one-fourth of the excess, if any, of the actual rents collected in the preceding quarter-annual period over the sum of ONE HUNDRED SIXTY-SEVEN THOUSAND NINE HUNDRED SEVENTY-ONE and 13/100 ($167,971.13) DOLLARS.

7. *Cancellation by Corporation.* CORPORATION shall have the right and privilege to cancel this agreement in the event of a bona fide sale of its leasehold, provided:

(a) PENN shall receive ninety-five (95%) percent of the net profits of the sale of the lease;

(b) the balance remaining unpaid on the original loan of SEVEN HUNDRED THIRTY THOUSAND ($730,000.00) DOLLARS is fully repaid; and

(c) adjustments are made of net profits for the fiscal year of cancellation or for the portion of the fiscal year of cancellation from the beginning of such period to the date of the sale of the leasehold.

8. *Assignment.* It is understood and agreed that PENN shall not have the right to assign this agreement or its rights hereunder, without the prior consent of the CORPORATION, in writing.

9. *Arbitration.* Any dispute under this agreement shall be settled by arbitration, pursuant to the rules, then in effect, of the American Arbitration Association.

10. *Benefit.* This agreement shall be binding upon CORPORATION, its successors and assigns, and PENN, their executors, administrators and assigns.

IN WITNESS WHEREOF, the parties hereto have executed this agreement the day and year above written.

461-8th AVENUE CORPORATION

By /s/ Simeon F. Gross, Pres.

PENN ASSOCIATES

By /s/ Herman J. Schectman (L.S.)

/s/ Sidney P. Schectman (L.S.)

/s/ John D. Bussel (L.S.)

/s/ Henry Spellman (L.S.)

/s/ George Zuckerman (L.S.)

General Partners

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1075

SUPREME COURT, U.S.
FILED
MAR 24 1972
MICHAEL RODAK, JR., CLERK

JACOB FERSHTMAN, HAROLD SIEGEL, ISABEL WEST, ZITA GARFIELD, LARRY SOMMA, HYMAN FREYDBERG, RENA KLEIN, JACOB KRIVILOFF, AGNES SHOEMAKER, as Executrix of the Estate of ROBERT SHOEMAKER, individually and as Limited Partners of PENN ASSOCIATES, a New York Limited partnership,

Petitioners,

—against—

HERMAN J. SCHECTMAN, SIDNEY P. SCHECTMAN, JOHN D. BUSSEL, HENRY SPELLMAN, GEORGE ZUCKERMAN, individually and as General Partners of PENN ASSOCIATES, PENN ASSOCIATES, 461-8TH AVENUE CORPORATION, ROSE W. GROSS, as Executrix of the Estate of SIMEON F. GROSS and ELLIOT S. GROSS, co-partners doing business under the firm and style of "Simeon F. Gross and Elliot S. Gross", ROSE W. GROSS as sole distributee of the Estate of SIMEON F. GROSS, ELLIOT S. GROSS and ARTHUR YOUNG & COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT ARTHUR YOUNG & COMPANY IN OPPOSITION

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WHITE & CASE
Of Counsel

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1075

JACOB FERSHTMAN, *et al.*,

Petitioners.

—against—

HERMAN J. SCHECTMAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT ARTHUR YOUNG & COMPANY IN OPPOSITION

This brief is submitted by respondent Arthur Young & Company in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, dated February 1972.

Question Presented

Do allegations that an accounting firm "caused false and improper statements and income tax returns to be prepared" for a partnership after its formation, state a claim against the accountants under the Securities Act or Securities Exchange Act for "aiding and abetting" in the prior formation of the partnership or the termination of the partnership pursuant to the terms of the partnership agreement?

Statement of the Case

The petition for certiorari herein refers only twice (pp. 9, 11) to respondent, Arthur Young & Company, a national firm of certified public accountants. Because of the nature of the charges against Arthur Young & Company, and the presentation by the other respondents as to the general factual background, we limit this statement of the case primarily to the facts relating to Arthur Young & Company.

As the opinion of the Court of Appeals below indicates (App. 1a, 6a-7a), this case involves the interpretation of an agreement of limited partnership, an apparent discrepancy between the partnership agreement and a subsequent letter, and an abundance of charges allegedly concerning fiduciary obligations. Arthur Young & Company is charged with "aiding and abetting," but the only actual factual allegations are that, after the formation of the limited partnership of Penn Associates, Arthur Young & Company "caused false and improper statements and income tax returns to be prepared and distributed showing distribution of income to the limited partners knowing they would rely thereon." (Complaint ¶21).

There is no allegation in the complaint that Arthur Young & Company participated in the formation of the partnership, sold the "securities" to the limited partners, or that Arthur Young & Company participated in any way in the termination of the partnership. (A subsequent lengthy affidavit by counsel for petitioners referred to accounting work done by Arthur Young & Company in the course of the partnership's existence.) Upon the motion to dismiss herein, the District Judge found that there was

> "no doubt that what plaintiffs are claiming is that Arthur Young & Company, in its capacity as accountant of the partnership, incorrectly handled the accounting." (App. B, 13a note)

and that the complaint was a "transparent attempt to state a federal claim against Arthur Young & Company when none in fact exists" (App. B, 14a). For this reason, as well as for the reasons expressed with respect to the claim against the general partners, the complaint was dismissed.

There Are No Considerations Warranting Review By This Court

As the opinions of the courts below point out (App. A, 6a-8a; App. B, 17a), the claims herein are essentially for rescission or reformation of the partnership agreement and a dispute as to what were the terms of the agreement of limited partnership. As such, the case presents unique but not generally important issues which would require settlement by this Court.

The charges against Arthur Young & Company of improper accounting for the partnership during its 12 year existence does not raise a federal question nor one that conflicts with applicable decisions of this Court. While *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U.S. 6 (Nov. 8, 1971), read §10(b) of the Securities Exchange Act to bar deceptive devices in the purchase and sale of securities, this Court "agree[d] that Congress by §10(b) did not seek to regulate transactions which constitute no more than internal corporate mismanagement." *Id.* at 12. Even less did Congress intend by enacting §10(b) to regulate the accounting for expenses, income, profits, losses and distributions following formation of an enterprise.

Thus there is no conflict in the dismissal of the claim against Arthur Young & Company by the decision below with the decision in *Allico Nat'l Corp.* v. *Amalgamated Meat Cutters & Butcher Workmen*, 397 F. 2d 727 (7th Cir. 1968), nor with the decision in the *Bankers Life* case. Peti-

tioners claim, if any, is under state law, and does not require review by this Court.

Dated: New York, New York
March 22, 1972

Respectfully submitted,

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14 Wall Street
New York, New York 10005

P. B. Konrad Knake
White & Case
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

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-against-

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Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ARGUMENT

A. The Much Criticized Holding of *Birnbaum v. Newport Steel Corp.*,[1] Should Be Finally Laid to Rest.

The Court of Appeals concluded its decision by affirming the District Court's dismissal of the complaint on the ground

petitioners were not "forced sellers", by virtue of "their refusal to sign papers evidencing the return of their capital and their share of the profits." (Petitioners' Appendix A, p. 8a)[2] The purchaser-seller doctrine enunciated by said Court in *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir. 1952), cert. denied 343 U.S. 956 (1952), on which the Court below relied, is unfortunately still very much alive. In a more recent decision District Judge Gurfein in the Southern District of New York, upon reviewing the "*Birnbaum*" doctrine in *Haberman v. Murchison*, 335 F. Supp. 286 (S.D.N.Y. 1972) concluded "[a]ccordingly, Birnbaum is left where it was" (at p. 289).

The Securities and Exchange Commission filed an Amicus brief in the Eighth Circuit (February 23, 1972) in *Travis v. Anthes Imperial Ltd.*, in asking for an abandonment of the "*Birnbaum*" doctrine, urging an "approach far more certain to assure consistent vindication of the Congressional purposes would be outright rejection". (Securities Regulation & Law Report, the Bureau of National Affairs, Number 141, p. A-2 March 1, 1972). The S.E.C. urged the Eighth Circuit to "take this opportunity unambiguously to reject the Birnbaum doctrine", as arbitrary that results in hardship. Surely, *Birnbaum* cannot survive in the light of this Court's analysis of the Congressional intent in *Superintendent of Insurance of the State of New York v. Bankers L. & Cas. Co.*, 404 U.S. 6 (1971).

This case further demonstrates the need for interment by this Court of the *Birnbaum* "purchaser-seller" doctrine. As we pointed up in our Petition, the Circuit Court assumed facts which were not true, since four (4) of the petitioners did sign papers, received their capital and thereby were "forced-sellers" by the Court's requirement (Pet. App. A, p. 8a). The respondents have not denied in their opposing briefs that the Circuit Court erroneously based its opinion on this assumed fact. Furthermore, analysis of respondents' brief — wherein

they seek to have it both ways — patently demonstrates their concession that this case turns on whether respondents' resultant ownership of the lease came about from the "forced-sale" of the limited partners' interests.

B. Respondents' Counter-Statements of Facts are Untrue, Distorted and Merely Arguments of Counsel.

In an attempt to bolster their case, respondents have indulged in incorrect and distorted misstatements of facts not justified by the record. In many instances argument is substituted for facts; calculated to divert the Court's attention from the gravamen of petitioners' complaint (¶¶ 29-32, Res. App. A, pp. 12a-13a),[3] that the general partners' activities complained of constituted a "forced-sale" of the limited partners' interests. Respondents seek to have this Court condone their breaches of fiduciary obligation[4] by speaking of "redemption" [15a][5] of the limited partners' interest as if it were a debenture and the relationship of the general partners to the limited partners was that of debtor and creditor. This Court should reject these misstatements, misrepresentations and arguments under the guise of "facts". Examples of these distortions and misstatements are footnoted hereafter.[6]

C. Respondents Raise Issues for the First Time in This Court.

On March 29, 1968 the general partners mailed to the limited partners the notice of termination of the partnership. It was the declaration and mailing of this notice which petitioners claim constituted the "forced-sale" as alleged in ¶¶ 29-32 of the complaint (Res. App. A, pp. 12a-13a). For the first time in this Court respondents raise the argument that the complaint does not allege the sales "were made by means of interstate commerce or the mails" [10a].

The complaint (¶ 2, Res. App. A p. 2a) alleges the cause of

action arose under Section Nos. 12(2) and 17(a) of the Securities Act of 1933 as amended and Section 10(b) of the Act of 1934 and Rule 10b-5.

Section No. 12(2) of the Securities Act of 1933 besides permitting a recovery for damages to the person purchasing a security even "if he no longer owns the security" gives rise to such cause of action against one who offers or sells a security by the use of interstate commerce, or the mails which language is also contained in Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5. (Petitioner's Petition for a Writ of Certiorari, pp. 3-4). Alleging these sections are a sufficient allegation of the provisions contained therein, Respondents' objection is not well taken.

D. Respondent Arthur Young & Company Aided and Abetted the General Partners' Fraudulent Conspiracy.

Arthur Young & Company, the general partners' accountants, from the inception of the transaction, aided, abetted and helped mastermind the fraudulent conspiracy to appropriate and convert the lease. Examples of some of the things which aided and abetted the general partners are they signed United States corporate income tax returns under penalty of perjury that Simeon F. Gross, the president of the corporate defendant was the 100% owner of all of its stock when they knew he wasn't; they siphoned off the tax benefits of the amortization of the leasehold acquisition and depreciation of improvements and violated the operational agreement to give respondents all of the tax benefits. They failed to disclose that the lease had been extended in their schedules prepared for and attached to the defendants' March 29, 1968 unilateral declaration of termination of the partnership, which schedules the general partner used to give authenticity to by the use of Arthur Young & Company's prestigious name. Moreover, the record is replete with facts indicating why the complaint should not have been

dismissed against this particular and equally culpable respondent.

CONCLUSION

The petition for a writ of certiorari should be granted.

In addition, petitioners respectfully suggest that summary reversal may be in order in the light of the erroneous assumption by the Court of Appeals that all of the petitioners were not "forced-sellers."

Respectfully submitted,

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Footnotes

1. 193 F.2d 461 (2d Cir. 1952), cert. denied 343 U.S. 956 (1952).

2. Petitioners' Appendix hereafter referred to as "Pet. App." refers to the appendices to the Petition for Writ of Certiorari.

3. Respondents' Appendix hereafter referred to as "Res. App." refers to the Appendices to Respondents other than Arthur Young & Company's brief.

4. The damages of $2,000,000 sought to be recovered for the partnership was not "plucked from the atmosphere" but is alleged as the value of the lease. (Pet. App. A, p. 5a).

5. All references in brackets are to pages in respondents' brief.

6. (a) Respondents argue, "[t]he leasehold was owned by the respondent corporation" and Penn Associates, "was formed in 1956 to manage the leasehold of premises known as 461 - 8th Avenue" [p. 3a] Title of the leasehold was not in the respondent corporation at the time the limited partners were invited to participate in the venture. No written prospectus outlining the transaction was ever furnished the limited partners prior to the call for their capital. When the partnership agreement was presented to the limited partners for signature on May 5, 1956 it was not disclosed to any limited partner that a closing was going to take place on Monday, May 7, 1956, or that at the closing the general partners would cause the ownership of the leasehold to be taken in the corporate defendants' name. Nor, were any other facts in connection with the acquisition of the lease disclosed to the limited partners, which the general partners admitted on their deposition.

Contrary to respondents' contention the Court of Appeals found that Penn Associates was formed "for the purchase of a lease", (Pet. App. A, p. 2a) rather than merely to manage it.

(b) Respondents state "[t]he limited partnership agreement of Penn Associates, dated May 4, 1956, a copy of which is annexed to the complaint in this action and appears in the appendix hereto as Appendix B at pages 17a-34a" is a misstatement of fact calculated to mislead this Court [3a] on one of the principal contested issues in this litigation. Attached to the complaint is a copy of the limited partnership agreement (Res. App. B, pp. 17a-28a). The operational agreement (Res. App. B, pp. 29a-34a) was not attached to the partnership agreement when petitioner signed it and was never disclosed nor seen by them until it was begrudingly elicited from the respondents after the Kaine action had been instituted. The reference to the corporate defendant in the partnership agreement (¶ 13 - Res. App. B, p. 24a) without disclosure of respondents involvement created the inference that 461 - 8th Avenue Corporation was from whom Penn Associates was purchasing the lease.

It is undisputed this operational agreement was not in existence prior to May 4th and it had not been shown or disclosed to any of the limited partners prior to the payment by them of their capital contribution or the institution of the Kaine action. The respondents' appendix in its head title on pages 29a-34a misrepresents and misleads that this operational agreement between Penn Associates and the respondent corporation is part of the limited partnership agreement attached to plaintiff's complaint.

(c) Respondents argue there was "no reason to tell the limited partners the lease had been extended"[6a]. This contention is contrary to the Congressional intention in enacting the Federal Securities Laws which require disclosure to

prevent those in control or in a fiduciary position to participate in self-benefitting transactions at the expense of their beneficiaries.

(d) Respondents' contention that the general partners did not undertake to sell the lease [7a], even if true, does not license the general partners to appropriate and convert the partnership assets by manipulative devices. However, this contention is inconsistent with the general partners' fiduciary obligation to turn the assets of the partnership into a profit for all, rather than use the partnership as a vehicle for their unjust-enrichment. As noted in item (H) *infra*, ¶ 13 of the partnership agreement provides that the general partners may extend the lease but it does not state that the lease would belong to the general partners as a result of their unilateral declaration of the termination of the limited partnership before the expiration of the lease which had over 3-1/2 more years to go at the time the general partners appropriated and converted the leasehold.

(e) Respondents contention that petitioners knew the stock of the corporate defendant was held for the general partners intends to mislead this Court [7a]. Petitioners did not know of the existence of the corporation and so allege in their complaint (¶¶ 17-20, Res. App. A, pp. 5a-7a).

(f) The May 14, 1956 letter from respondent Schectman to Kaine (Pet. App. C, p. 19a), assuring him "that the general partners can only pay off the limited partners in the event that the leasehold of the office building is sold" supports petitioners' contention that ¶¶ 6, 8 and 14 are mutually supporting and should be interpreted that the partnership could not be terminated as long as the venture had an interest in the lease or until the lease was sold. The possibility of a capital gain sale, thereby converting ordinary income to capital gain resulting

from increased rents, was one of the prime inducing motives for the petitioners to become limited partners. Otherwise, why would paragraph 14(c) have been inserted in the partnership agreement (Res. App. B, p. 25a) providing for the distribution of capital gain upon a sale? Additionally, evidencing that intention, ¶ 7(a) of the operational agreement (Res. App. B, p. 33a) makes similar provision for the distribution of capital gain. Since the respondents had control of the entire transaction, any doubts as to the meaning of this representation should be resolved against the respondents.

(g) The argument that the release of the parking lot in whose income the limited partners shared, was inconsequential since the general partners personally guaranteed the limited partners a return of 12% on their outstanding capital has no validity. [6a] ¶ 13 of the partnership agreement only requires that the limited partners be paid 12% if there is a modification of the rental whereby the limited partners receive less than 12%. However, where the limited partners are receiving 12% of their capital and rental income is released by the general partners, it reduces the limited partners' share of the profits in excess of 12%. If the complaint does not mention the release of the parking lot, it is because it need only plead ultimate facts. The allegations of a single fraudulent conspiracy to self-benefit the respondents at the expense of the limited partners, by the appropriation of the lease covers the presentation of the facts of the release of the parking lot to the owner of the fee to obtain the 20-year extension of the lease.

(h) Petitioners have no quarrel with the contention that ¶ 13 of the partnership agreement (Res. App. B, p. 24a) gave the general partners the right to extend the lease [4a]. Petitioners' complaint is the extension of the lease was obtained while the partnership was in existence, by releasing partnership property with attendant reduction of rental which petitioners

shared and not for the benefit of the partnership but as a preliminary step to its conversion and appropriation by the general partners by the termination of the partnership. ¶ 13 of the partnership agreement read in conjunction with ¶ ¶ 6, 8, 14 and the letter dated May 14, 1956 (Pet. App. C, p. 19a) must be interpreted if the lease had been sold or the leasehold expired the general partners were not obligated to continue the partnership by further utilization of the funds realized to make other investments.

(i) The events surrounding the formation of the partnership in the early part of May, 1956 conclusively indicate, contrary to respondents' denial, that the execution of the limited partnership agreement was a hurried affair [5a]. The partnership agreement and certificate of limited partnership are both dated Friday, May 4, 1956. They were signed by all of the limited and general partners, either on Saturday, May 5th, or Monday, May 7, 1956. Execution of said documents by the limited partners was rushed over the weekend on the pretext they would lose the deal or a month's rent (closing paragraph, Pet. App. C, p. 20a). The real reason, however, was the closing for the purchase of the lease had been scheduled by the general partners for May 7, 1956. Since the general partners instead of providing their agreed capital contribution had arranged with the Irving Trust Company, to lend the partnership $300,000, to be applied on account of their capital contribution the bank required that a formal limited partnership agreement be first filed in the County Clerk's office as required by New York Law to give legal existence to the partnership before it would make the loan.

(j) Petitioners claim that when their capital contribution was requested on either the first, second or third of May, it was represented to them that all partners, including the general partners, were making their capital contribution. The

respondent Herman J. Schectman corroborated this on his deposition.

> "After all, the partners made a substantial investment.
>
> "He (Kaine) said, 'if you make an investment, Herman, I will make the investment'."

Said deposition contradicts respondents' counsel's claim that "[n]o representation was made to any limited partner that the general partners had cash to put into the venture" [5a]. And, so, it can be understood that under the hurried conditions where the partnership agreement was brought by messenger to the homes of Kaine and other limited partners, for signatures, on Saturday, May 5, with the exhortation not to delay the messenger making the round, at which time they were not represented by counsel and had no opportunity to discuss or question the partnership agreement, the language of ¶ 15 (Res. App. A, p. 25a), that the general partners could pledge the assets of the partnership was something that had never been discussed beforehand and had reference to the future, the general partners having represented a few days before all of the partners including themselves were contributing their cash capital.